An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?

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I. INTRODUCTION: COMMON PRACTICES THAT HAVE LARGELY AVOIDED CLOSE SCRUTINY

A number of standard procedures that are widely utilized in estate planning raise serious ethical questions. What is beneficial for a lawyer's estate planning practice often involves conduct that is questionable from an ethical standpoint. For example, many lawyers offer to retain, without charge, the original of their clients' wills in their office safes.[1] Subsequently, on the death of a testator, the executor named in the will or a member of the decedent's family typically will go to the drafting lawyer's office to obtain the original will to offer it for probate. From one perspective, the lawyer has provided a service to his or her client by safekeeping the will. Yet, it is also true that the draftman's chances of being retained to provide legal services during probate are undoubtedly enhanced by this face-to-face encounter. Thus, a lawyer's offer to retain the original will may constitute solicitation of future legal business in a manner inconsistent with the obligations arising out of the attorney-client relationship. Before condemning this practice, however, the benefits of the safekeeping of wills should be balanced against the potential ethical improprieties.[2]

The ethical issues presented by safekeeping of wills are similar to questions raised by other common practices utilized by attorneys engaged in estate planning. These problems are pervasive throughout the practicing bar, because a substantial number of lawyers draft wills and trusts even though they do not specialize in this work.[3] Yet, in spite of the widespread nature of these potentially unethical practices, little attention is given to them in the codes of professional conduct, few disciplinary proceedings involving these issues have been brought, and the literature has largely ignored these ethical problems. Consequently, many of the practices have gone unquestioned, and many of the lawyers engaged in estate planning do not fully appreciate the ethical concerns that their activities raise.

This Article will explore in depth a number of common estate planning practices from an ethical standpoint and will examine counterbalancing considerations to weigh the benefits that may be presented by attorneys' actions in particular situations.

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1. *See, e.g.*, State v. Gulbankian, 54 Wis. 2d 605, 611–12, 196 N.W.2d 733, 736 (1972); J. BARNES, WHO WILL GET YOUR MONEY? 8 (1972); C. LYMAN, PRACTICAL ASPECTS OF DRAFTING WILLS 127-28 (1962); Johnson, *The Danger of Retaining Custody of a Will*, PRAC. LAW., Oct. 15, 1979, at 51; Herman, *Mistakes in Writing Wills, Even by Lawyers, Lead to Family Fights, Legal Problems for Heirs*, Wall St. J., Oct. 27, 1980, at 50, col 1.

2. For a detailed discussion of the ethical issues that are raised by an attorney's practice of safekeeping clients' wills, see *infra* text accompanying notes 426–92.

3. *See, e.g.*, R. LYNN, INTRODUCTION TO ESTATE PLANNING 2 (3d ed. 1983); Kram, *Estate Planning: The Public's Perceptions and Attitudes*, 8 REAL PROP. PROB. & TR. J. 489, 492 (1973); Pedrick, *Estate Planning and Future Shock, The Alan N. Polasky Memorial Lecture of 1977*, 11 INST. ON EST. PLAN. ¶¶ 1800, 1802 (1977); Zabel, *Legal Malpractice in Estate Planning*, 88 ADVANCED WILL DRAFTING 257, 264 (1978).

No attempt will be made, however, to evaluate many of the conflicts of interest that are inherent in estate planning, such as those raised when the same lawyer simultaneously draws wills for both husband and wife.[4] Such questions are so broad and complex that they require their own exhaustive treatment.[5]

The purpose of reviewing various ethical considerations involved in a number of will and trust drafting practices is not so much to criticize or condemn lawyers' conduct as it is to increase the sensitivity of practitioners by highlighting the problem areas. This is done in the belief that many of the attorneys engaged in estate planning would act differently if they perceived that their activities raised significant ethical questions.

II. Attorneys Named as Beneficiaries in Wills That They Draft

The issues raised when an attorney drafts a will in which he or she is included as a beneficiary are both obvious and straightforward from an ethical standpoint. An inherent conflict of interest exists when an attorney is named as a beneficiary in a will which he or she has prepared, since the draftsman has an obvious interest — fostering the legacy — that is inconsistent with a lawyer's obligation to render independent legal advice.[6] Further, even in the absence of wrongdoing, the mere fact that the drafting attorney is also a beneficiary under a document that he or she has prepared inevitably involves an appearance of impropriety.[7] This tends to discredit the legal profession and is of considerable concern to both the courts and the bar.[8] Moreover, a

4. For example, marital deduction provisions can raise conflicts of interest problems for the estate planner who is preparing wills for both spouses. Prior to enactment of the Economic Recovery Tax Act of 1981, wills were often prepared to take advantage of I.R.C. § 2056(b)(5) (1976) and, *inter alia*, provided the surviving spouse with a general power of appointment over the so-called marital deduction or "A" trust. Simultaneously, a will would also be drawn for the other spouse that intentionally would not exercise the power of appointment, so that the proceeds of the "A" trust would pass to the takers in default designated in the first will. *See generally* 1 F. Hoops, Family Estate Planning Guide § 209, at 469–78 (3d ed. 1982); 4 A. Casner, Estate Planning 1484–1515 (4th ed. 1980). Under these circumstances, the attorney-draftsman may be acting primarily for the testator with the larger estate, and the other spouse may receive little, if any, independent advice about the desirability of exercising the general power of appointment. While I.R.C. § 2056(b)(5) (1976) remains a useful planning tool, The Economic Recovery Tax Act of 1981 created yet another area for spousal conflict by the addition of I.R.C. § 2056(b)(7) (Supp. V 1981). This section permits a marital deduction for "qualified terminable interest property" (QTIP), whereby one spouse's property can be left to the surviving spouse in a manner that qualifies it for the marital deduction even though the surviving spouse has no power, even by will, over the property or its ultimate disposition. The potential conflict arises because the surviving spouse has no control over the marital deduction property, although, of course, that spouse must receive the income from that property for his or her life. Thus, the interest of one spouse in setting up a QTIP trust may be very different from the interest of the other spouse. 1 F. Hoops, *supra*, § 212, at 481–82; Strauss, *Qualified Terminable Interest Property Offers New Opportunities But Many Problems Are Unresolved*, 9 Est. Plan. 74 (1982).

5. *See, e.g.*, B. Wolfman & J. Holden, Ethical Problems in Federal Tax Practice 98–99 (1981); Eckhardt, *The Estate Planning Lawyer's Problems: Malpractice and Ethics*, 8 Inst. on Est. Plan. ¶¶ 74.600, .606.3, .609 (1974); Flaherty, *Conflicts of Interest Arising in the Two-Spouse Estate Planning Context*, Est. Gift & Tr. J., May–June 1982, at 17; Midonick, *Attorney-Client Conflicts and Confidences in Trusts and Estates*, 35 Rec. A. B. City N.Y. 215 (1980); *Panel Discussion: Professional Ethics*, 8 Inst. on Est. Plan. ¶ 74.700, at 7–3 to 7–9, 7–18 to 7–21 (1974); *Role and Function of the Estate Lawyer*, 12 Real Prop. Prob. & Tr. J. 223, 237–38 (1977).

6. *See* Model Code of Professional Responsibility DR 5–101(A), EC 5-1, 5-2, 5-5 (1983); Model Rules of Professional Conduct Rule 1.7(a) (1983).

7. Model Code of Professional Responsibility Canon 9, EC 9–6 (1983) (Canon 9 provides that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety.").

8. *See, e.g.*, *In re* Krotenberg, 111 Ariz. 251, 253, 527 P.2d 510, 512 (1974); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 844 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); State v. Collentine, 39 Wis. 2d 325, 331–32, 159 N.W.2d 50, 53 (1968).

number of commentators who have written on this subject are highly critical of such conduct.[9] Thus, it is not surprising to find that the courts are taking an increasingly hard stand against this activity.[10] Under the circumstances, it would be tempting to omit discussion of the problems raised when an attorney prepares a will in which he or she is named as a beneficiary but for the prevalence of the practice, which is evidenced by the numerous reported cases[11] and ethics opinions[12] that deal with the propriety of this behavior. Furthermore, this conduct can not be dismissed as an anomaly that pertains only to a fringe element among practitioners who are unable to withstand the obvious enticements of being the recipient of a client's gratuitous bounty, because there is evidence that any lawyer, no matter how successful or well-known, may succumb to such temptations.[13]

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9. *See, e.g.*, 2 A. CASNER, *supra* note 4, at 607–08; Miller, *Functions and Ethical Problems of the Lawyer in Drafting a Will*, 1950 U. ILL. L.F. 415, 439; *Panel Discussion: Professional Ethics*, *supra* note 5, at ¶ 74.700, at 7–25 to 7–30 (1974); Comment, *Considerations of Professional Responsibility in Probate Matters*, 51 NEB. L. REV. 456, 471–72 (1972) [hereinafter cited as NEB. L. REV. Comment]. *But see* H. DRINKER, LEGAL ETHICS 94 (1953). Drinker, the leading authority on professional responsibility during the middle of this century, was considerably more tolerant of an attorney preparing a will in which he or she was named a beneficiary; although he advised that lawyers proceed with caution in such situations, he concluded that the propriety of such conduct should depend on the particular circumstances.

10. *See, e.g.*, Committee on Professional Ethics v. Sylvester, 318 N.W.2d 212 (Iowa 1982) (indefinite suspension); Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979) (disbarment), *cert. denied*, 446 U.S. 946 (1980); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa) (indefinite suspension), *appeal dismissed*, 444 U.S. 805 (1979); Estate of Karabatian v. Hnot, 17 Mich. App. 541, 170 N.W.2d 166 (1969) (attorney's conduct in preparing will in which he was named as a beneficiary held to be against public policy); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976) (one year suspension and return of sizeable fees); *In re* Gonyo, 73 Wis. 2d 624, 245 N.W.2d 893 (1976) (six month suspension); State v. Gulbankian, 54 Wis. 2d 599, 196 N.W.2d 730 (1972) (sixty day suspension).

11. *See, e.g.*, *In re* Krotenberg, 111 Ariz. 251, 527 P.2d 510 (1974); *In re* Thompson's Estate, 1 Ariz. App. 18, 398 P.2d 926 (1965); Allen v. Estate of Dutton, 394 So. 2d 132 (Fla. Dist. Ct. App. 1980); *In re* Saladino, 71 Ill. 2d 263, 375 N.E.2d 102 (1978); Committee on Professional Ethics v. Sylvester, 318 N.W.2d 212 (Iowa 1982); Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); *In re* Estate of Ankeny, 238 Iowa 754, 28 N.W.2d 414 (1947); DiMaggio v. Powers (*In re* Estate of Barclay), 215 Kan. 129, 523 P.2d 376 (1974); Estate of Karabatian v. Hnot, 17 Mich. App. 541, 170 N.W.2d 166 (1969); State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); Shaffer v. Graham (*In re* Estate of Lawson), 75 A.D.2d 20, 428 N.Y.S.2d 106 (1980); Haughian v. Conlan, 86 A.D. 290, 83 N.Y.S. 830 (1903); *In re* Suydam's Will, 91 N.Y. Sup. Ct. (84 Hun) 514, 32 N.Y.S. 449 (1895), *aff'd*, 152 N.Y. 639, 46 N.E. 1152 (1897); Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972); Hubbell v. Houston, 441 P.2d 1010 (Okla. 1967); *In re* Jones, 254 Or. 617, 462 P.2d 680 (1969); *In re* Kneeland, 233 Or. 241, 377 P.2d 861 (1963); *In re* Moore, 218 Or. 403, 345 P.2d 411 (1959); Lyons v. Wilson (*In re* Lobb's Will), 173 Or. 414, 145 P.2d 808 (1944); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981); *In re* MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960); *In re* Gonyo, 73 Wis. 2d 624, 245 N.W.2d 893 (1976); State v. Gulbankian, 54 Wis. 2d 599, 196 N.W.2d 730 (1972); Komarr v. Beaudry (*In re* Estate of Komarr), 46 Wis. 2d 230, 175 N.W.2d 473 (1970); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

12. *See* Opinion 74–24, 3 ARIZ. ST. B. NEWSLETTER 3 (Nov. 1974), *reported in* O. MARU, 1975 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 70, No.7626 (1977) [hereinafter cited as MARU 1975]; Opinion 840 (Oct. 25, 1973), N.C. ST. B. II–266, *reported in* MARU 1975, *supra*, at 420, No. 9591; Opinion 71, 16 TEX. B. J. 223 (April 1953); Informal Opinion I–3, 32 WASH. ST. B. NEWS 27 (Jan. 1978), *reported in* O. MARU, 1980 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS [hereinafter cited as MARU 1980]; Memorandum Opinion 3–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra*, at 613, No. 13186; Informal Opinion 1963–4, 2 ETHICS OPINIONS: OPINIONS OF THE COMMITTEE ON LEGAL ETHICS OF THE LOS ANGELES COUNTY BAR ASSOCIATION 71 (1972) [hereinafter cited as L.A. ETHICS OPINIONS], *reported in* MARU 1975, *supra*, at 103, No. 7794.

13. *See* Randall v. Reynolds (*In re* Randall), 640 F.2d 898 (8th Cir. 1981) (subsequent disbarment from federal courts). In *In re* Randall, John D. Randall, who was disbarred for conduct that included, *inter alia*, being both draftsman and sole beneficiary of a client's will, was one of the leading attorneys in the State of Iowa and a past president of the American Bar Association. *Id.* at 903; Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979) (disbarment by Supreme Court of Iowa), *cert. denied*, 446 U.S. 946 (1980). *See also In re* MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960).

A. *An Overview of the Ethics Rules*

In this area, at least, the current Code of Professional Responsibility contains a provision directly relevant to attorneys who are considering the preparation of a will in which they are to be named a beneficiary:

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.[14]

EC 5-5 is clearly weakened by the use of the permissive verb "should" rather than the mandatory "shall" or "must."[15] Further, the phrase "exceptional circumstances" is not defined, thus adding a needless ambiguity that might exempt an attorney's conduct from the provisions of EC 5-5.[16] But perhaps the greatest oversight in EC 5-5 is its failure to recognize that questions regarding the propriety of an attorney's inclusion of such a gift, at least in the will drafting context, are likely to arise only after the testator has passed away and the will is probated.[17] Thus, the person who would be in the best position to shed light on the testamentary gift to the scrivener has been silenced by death, and the lawyer may be free, without fear of contradiction, to testify that he or she did not "suggest" the gift, that the draftsman did "urge" the testator-client to seek disinterested advice, and that the attorney did "insist," without success, that the testator-client utilize another lawyer to prepare the will.[18]

The comparable provisions of the new ABA Model Rules of Professional Conduct represent a distinct improvement over the Code of Professional Responsibility:

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14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1983).

15. This comment is applicable, of course, to the entire Code of Professional Responsibility and not just to EC 5-5, since the Disciplinary Rules, which establish minimum standards, are generally stated in mandatory terms, whereas the Ethical Considerations, which are supposedly aspirational in nature, virtually always use permissive verbs like "should" or "may." *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-25, 7-28 (1983).

16. Neither the annotations to the Code of Professional Responsibility nor the extensive comments to the comparable provisions of Rule 1.8 of the Model Rules of Professional Conduct shed any light on the meaning of the phrase "exceptional circumstances." *See* ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 190–92 (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c), Legal Background (Proposed Final Draft 1981). *See also* Committee on Professional Ethics v. Randall, 285 N.W.2d 161, 165 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 846 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); Opinion 74–24, 3 ARIZ. ST. B. NEWSLETTER 3 (Nov. 1974), *reported in* MARU 1975, *supra* note 12, at 70, No. 7626.

17. *See, e.g.*, Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963). *But see In re* Saladino, 71 Ill. 2d 263, 375 N.E.2d 102 (1978) (testator, while still alive, complained about attorney's conduct, which included, *inter alia*, the preparation of a series of wills and codicils that contained bequests to the draftsman).

18. *See, e.g.*, Magee v. State Bar of Cal., 58 Cal. 2d 423, 426–27, 374 P.2d 807, 809, 24 Cal. Rptr. 839, 841 (1962) (court comments that the attorney-draftsman's testimony was "the only direct evidence of what occurred during the 10 to 15 minutes he was alone with [the testatrix] in his office"); Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 435, 441 (N.D. 1980) (highlighting the benefits of an attorney-draftsman's self-serving testimony).

> A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.[19]

The prohibition is thus elevated to a mandatory black letter rule rather than buried in an Ethical Consideration. Unfortunately, the insertion of the modifier "substantial" immediately preceding "gift" unnecessarily adds uncertainty to the prohibition,[20] and the exception for the drafter's relatives is needlessly broad.[21]

Significantly, the original Discussion Draft of the Model Rules contained a broad provision prohibiting lawyers from participating in the preparation of such a will without an exception for the attorney-draftsman's relatives.[22] Such an all-inclusive prohibition has much to commend it,[23] but, as was often the case, response from the practicing bar caused the Commission on Evaluation of Professional Standards to modify its views in an effort to gain support for the adoption of the new rules.[24] These efforts were not totally successful, since the provisions in Rule 1.8(c) of the Proposed Final Draft were altered again at the ABA's mid-Winter meeting in New Orleans in February of 1983, where the House of Delegates voted in favor of other changes that further softened the prohibition to its present language.[25]

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19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (as amended Feb. 1983) (emphasis added).

20. The preceding draft of Rule 1.8(c) prohibited a lawyer from preparing a will in which the draftsman received "any gift" except when the client was related to the attorney. The addition of the word "substantial" was obviously an effort to relax the rule and permit "modest" bequests to the attorney-draftsman. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (Proposed Final Draft 1981). *See infra* text accompanying notes 91–109 for a discussion of the case law relating to modest bequests to the will's scrivener.

21. In this respect, Rule 1.8(c) is considerably less stringent than a number of the reported cases and ethics opinions. *See, e.g.*, State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963); Informal Opinion E-80-1, 53 WIS. B. BULL. 79 (Apr. 1981). *But see* Magee v. State Bar of Cal., 58 Cal. 2d 423, 432–33, 374 P.2d 807, 813, 24 Cal. Rptr. 839, 845 (1962); ABA Comm. on Professional Ethics and Grievances, Informal Opinion 1145 (1970); Informal Opinion 89, 57 MICH. ST. B.J. 311 (Special Issue, Feb. 1978), *reported in* MARU 1980, *supra* note 12, at 289, No. 11520. *See also infra* text accompanying notes 35–179 (discussing the propriety of the preparation of wills by attorneys who are named as beneficiaries therein).

22. Rule 1.9(b) of the initial Discussion Draft provided that "A lawyer shall not participate in the preparation of an instrument giving the lawyer or a member of the lawyer's family any gift, including a testamentary gift, from a client." MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.9(b) (Discussion Draft 1980).

23. *See infra* text accompanying notes 144–79.

24. The changes from the Discussion Draft (quoted in full *supra* note 22) to the Proposed Final Draft were substantial. In its May 30, 1981 version, the applicable provision had been relocated to Rule 1.8(c), which then provided that "A lawyer shall not *prepare* an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, *except where the client is a relative of the donee.*" MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (Proposed Final Draft 1981) (emphasis added).

25. Professor Geoffrey C. Hazard, Jr., the Reporter for the ABA Commission on Evaluation of Professional Standards, which was responsible for preparation of the Model Rules of Professional Conduct, offered the following explanation for the changes that were made in what is now Rule 1.8(c):

> Many commentators objected to the total prohibition on the ground that it would require lawyers to decline the preparation of wills for members of their own families, except where the lawyer was to be entirely excluded as a beneficiary. Typical situations would involve preparation of a will for a parent, spouse, or sibling. It seemed to us that the risk of abuse was small in the intrafamily sitation. In the first place, the family social unit would normally exercise some inhibitive influence against the lawyer's abusing his position as draftsman. In the second place, the lawyer would ordinarily be among the "natural objects of the testator's bounty" where the lawyer is a member of the family. Moreover, some lawyers in small towns expressed opposition to having to open their family affairs to another lawyer, who might be aligned with competitive social or economic interests. The Commission considered these factors in relation to the major objective, that of reducing the risk of exploitation of the grateful and perhaps lonely client. It seemed to us that the reformulation substantially achieved the intended objective, while allaying opposition that seemed to us to stand on legitimate ground.

Letter from Geoffrey C. Hazard, Jr. to Gerald P. Johnston (March 22, 1983) [hereinafter cited as Hazard Letter].

In addition to these code provisions, numerous cases and ethics opinions discuss the propriety of including a bequest or devise to a lawyer or a member of the lawyer's family when that lawyer drafted the will. These court decisions usually originate in one of two contexts: will contests based on undue influence emanating out of a scrivener's action in preparing a will in which the drafting attorney is named as a beneficiary, or disciplinary proceedings brought against an attorney on the basis of similar conduct. A presumption of undue influence will generally arise in a will contest when a named beneficiary had a confidential relationship with the testator and was involved in the preparation of the testator's will.[26] In the case of a lawyer, the required confidential relationship can be readily established, and the drafting of a will certainly qualifies as necessary involvement in the preparation of that document.[27] Disciplinary proceedings, on the other hand, are instituted by bar officials based on alleged ethical violations that occur when an attorney drafts a will under such circumstances,[28] and the proceedings are often brought in the aftermath of will contest litigation in which the attorney's conduct has been brought to light.[29] In either instance, however, the factual issues regarding the attorney's conduct and the relationship with the client are largely the same.[30]

Because the focus of this Article is on the ethical aspects of estate planning, attention will be devoted primarily to disciplinary proceedings rather than an examination of comparable factual situations presented in will contests. Nevertheless, it is significant that the risk of having a will overturned because an attorney-draftsman is named as a beneficiary raises, by itself, serious ethical questions.[31] In some

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26. *See In re* King's Estate, 63 Cal. App. 2d 365, 371–75, 146 P.2d 952, 955–57, (1944); Carpenter v. Carpenter (*In re* Estate of Carpenter), 253 So. 2d 697, 700–02 (Fla. 1971); Schwartz v. Lamberson (In re *Estate of Schwartz), 407 So. 2d 358, 362 (Fla. Dist. Ct. App. 1981); Bosheck v. Gappa (In re* Kajewski's Estate), 134 Neb. 485, 490–94, 279 N.W. 185, 188–89 (1938); 3 W. BOWE & D. PARKER, PAGE ON WILLS §§ 29.84, 29.95 (1961) [hereinafter cited as PAGE ON WILLS].

27. *See In re* Thompson's Estate, 1 Ariz. App. 18, 398 P.2d 926 (1965); Allen v. Estate of Dutton, 394 So. 2d 132 (Fla. Dist. Ct. App. 1980); Shaffer v. Graham (*In re* Estate of Lawson), 75 A.D.2d 20, 428 N.Y.S.2d 106 (1980); Nelson v. First Northwestern Trust Co. (*In re* Estate of Nelson), 274 N.W.2d 584 (S.D. 1978); Komarr v. Beaudry (*In re* Estate of Komarr), 46 Wis. 2d 230, 175 N.W.2d 473 (1970). *Contra* Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 441 (N.D. 1980) (quoting Storman v. Weiss, 65 N.W.2d 475, 517 (N.D. 1954).

28. *In Re* Krotenberg, 111 Ariz. 251, 527 P.2d 510 (1974); *In re* Saladino, 71 Ill. 2d 263, 375 N.E.2d 102 (1978); Committee on Professional Ethics v. Sylvester, 318 N.W.2d 212 (Iowa 1982); Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972); *In re* Jones, 254 Or. 617, 462 P.2d 680 (1969); *In re* Kneeland, 233 Or. 241, 377 P.2d 861 (1963); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976); *In re* Gonyo, 73 Wis. 2d 624, 245 N.W.2d 893 (1976); State v. Gulbankian, 54 Wis. 2d 599, 196 N.W.2d 730 (1972); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

29. *See, e.g.*, Magee v. State Bar of Cal., 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962); State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); *In re* Moore, 218 Or. 403, 345 P.2d 411 (1959); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981); *In re* MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

30. *Compare In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981) *with* Nelson v. First Northwestern Trust Co. (*In re* Estate of Nelson), 274 N.W.2d 584 (S.D. 1978); *compare In re* MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960) *with* Hendee v. Walker Bank & Trust Co. (*In re* Swan's Estate), 4 Utah 2d 277, 293 P.2d 682 (1956); *compare* State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963) *with* Hover v. Horan (Estate of Barnes), 14 Wis. 2d 643, 112 N.W.2d 142 (1961).

31. *See* State v. Horan, 21 Wis. 2d 66, 70, 123 N.W.2d 488, 490 (1963); NEB. L. REV. Comment, *supra* note 9, at 473. *See also* H. DRINKER, *supra* note 9, at 94; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c), Legal Background (Proposed Final Draft 1981).

jurisdictions this conduct can jeopardize an entire will, and not just the bequest or devise to the attorney.[32] Hence, a lawyer who allows the inclusion of a legacy in his or her favor has permitted self-interest to conflict with the attorney's duty to render independent advice to the client.[33] As DR 5-101 warns, an attorney should not accept employment if his or her professional judgment may be impaired by the lawyer's own personal and financial interests.[34]

B. *Disciplinary Actions Against Attorney-Draftsmen*

1. *Early Case Law*

In many of the early disciplinary proceedings involving lawyers who had drafted wills in which they were named as beneficiaries, the courts did not seem particularly concerned with the propriety of the attorneys' conduct.[35] Although the decisions were critical of the attorneys' dual roles as adviser and beneficiary and recommended against this practice, they tended to be lenient as to the imposition of discipline.[36] In *State v. Richards*,[37] for example, a lawyer was charged with unethical conduct for, *inter alia*, drafting a will for a testatrix in her early seventies in which the attorney was named as a principal beneficiary and designated as executor.[38] The Nebraska Supreme Court was generous in its evaluation of the attorney's conduct:

> We do not think respondent was guilty of unethical conduct merely because he drafted a client's will containing a provision therein whereby he became a beneficiary of a part of her estate when, as the record here shows, she insisted he do so. [Citations omitted.] Attorneys for clients who wish to leave them or their families a bequest or devise of part of their property, which they have a perfect right to do, will do well to have the will drawn by some other lawyer. But if a client insists on having his or her attorney draft a will containing such a provision we can see no reason why the attorney should refuse to do so and thereby defeat his client's wishes.[39]

Unfortunately, the opinion in *State v. Richards* does not indicate the derivation of the evidence that the testatrix "insisted" that her attorney be included as a bene-

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32. McCarthy v. Fidelity Nat. Bank & Trust Co., 325 Mo. 727, 30 S.W.2d 19 (1930); State v. Horan, 21 Wis. 2d 66, 74, 123 N.W.2d 488, 492 (1963); 3 PAGE ON WILLS, *supra* note 26, at § 26.111. Many jurisdictions, of course, follow the rule of partial invalidity. Under this rule, if an attorney-draftsman exerts undue influence over the testator, only the bequest to the attorney-draftsman will be jeoparized. *See In re* Estate of Ankeny, 238 Iowa 754, 764–67, 28 N.W.2d 414, 419–20 (1947); *In re* Lattouf, 87 N.J. Super. 137, 142, 208 A.2d 411, 414 (1965); Shaffer v. Graham (*In re* Estate of Lawson), 75 A.D.2d 20, 22, 428 N.Y.S.2d 106, 108 (1980); 3 PAGE ON WILLS, *supra* note 26, at § 26.111.

33. "A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client . . . . " MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-2 (1983).

34. *Id.* at DR 5-101(A).

35. *See, e.g.*, Magee v. State Bar of Cal., 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962); State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); Haughian v. Conlan, 86 A.D. 290, 83 N.Y.S. 830 (1903); *In re* Suydam's Will, 91 N.Y. Sup. Ct. (84 Hun) 514, 32 N.Y.S. 449 (1895), *aff'd*, 152 N.Y. 639, 46 N.E. 1152 (1897). *Contra In re* Moore, 218 Or. 403, 345 P.2d 411 (1959) (Oregon Supreme Court overturns the unanimous vote of the Board of Governors not to discipline an attorney who, *inter alia*, prepared a will in which he was the sole beneficiary, and suspends him for one year).

36. *See, e.g.*, Magee v. State Bar of Cal., 58 Cal. 2d 423, 433, 374 P.2d 807, 813, 24 Cal. Rptr. 839, 845 (1962) (disciplinary proceeding dismissed).

37. 165 Neb. 80, 84 N.W.2d 136 (1957).

38. *Id.* at 93–94, 84 N.W.2d at 143–46.

39. *Id.* at 94–95, 84 N.W.2d at 146.

ficiary, or the basis for its conclusion that the testatrix was adamant that her lawyer, rather than another attorney, draft the will containing the legacy in question.[40] The source of much, if not all, of this information was presumably the attorney himself, thus providing little chance for contradiction since the other principal party to any relevant conversations, the testatrix, was obviously unable to testify at the disciplinary hearing.[41]

The decision of the California Supreme Court in *Magee v. State Bar of California*[42] similarly reflects this early permissive attitude towards this type of conduct. The lawyer in *Magee* had drawn a will for the testatrix, who was eighty-one years old and in declining health, in which he was named as residuary beneficiary and designated as executor. Shortly after will execution, the testatrix also gave the attorney $4,500 in cash, allegedly as an advance on the legacy. After the death of the testatrix a relative contested the will, and it was found to have been the product of the attorney's undue influence.[43] In subsequent disciplinary proceedings based on the same conduct, the court acknowledged that an attorney who obtains an *inter vivos* or testamentary gift from a client by undue influence is guilty of an act of moral turpitude.[44] Nevertheless, in its review of the Board of Bar Governors' recommendation of a two-year suspension, the court determined that it was not bound by the earlier will contest decision, and hence that it could review the undue influence issue *de novo*.[45] After studying the same evidence that had been presented in the will contest, the court concluded that the attorney had successfully rebutted the presumption of undue influence.[46] Although unwilling to discipline the attorney for his conduct, the court did set out some guidelines for the benefit of other lawyers who might one day find themselves in a similar situation:

> The danger of a lawyer's advancing his self-interest at a client's expense is recognized by the profession generally and is reflected in the American Bar Association's Canons of Professional Ethics. . . . Since the client is entitled to disinterested advice, an attorney should not place himself in a position where his self-interest might prevent his giving that advice.
>
> For the very reason that the boundary between ethical and unethical behavior in such cases is not clearly defined, attorneys should avoid drawing wills containing gifts to themselves under circumstances in which there is a reasonable basis for suspicion that the

40. *Id.*

41. According to the court,

> [The attorney-draftsman] offered a great deal of evidence to show the close friendship between decedent and [the attorney's] family; her mental condition at the time she executed her last will . . . the reason why decedent changed her wills so often . . . and the fact that she had informed others that she was going to give [the attorney] some of her property. He also did the same regarding the preparation, execution, and handling of her last will.

Id. at 95–96, 84 N.W.2d at 146.

42. 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).

43. Ruckes v. Magee (*In re* Rohde's Estate), 158 Cal. App. 2d 19, 323 P.2d 490 (1958) (the testatrix's name was Mary Rohde; the draftsman-beneficiary's, Edward Howard Magee).

44. Magee v. State Bar of Cal., 58 Cal. 2d 423, 429, 374 P.2d 807, 810, 24 Cal. Rptr. 839, 842 (1962).

45. *Id.* at 429, 374 P.2d at 810–11, 24 Cal. Rptr. at 842–43.

46. *Id.* at 429–30, 374 P.2d at 811, 24 Cal. Rptr. at 843.

> client was overreached or that the gift would prevent the attorney from acting in the client's best interests. Such a practice would remove any temptation to deal unfairly and would protect the reputation of the profession. When an attorney does draw a will under circumstances that suggest that he took advantage of a client's weakness or that he benefited unduly he must justify his action as he must when an inference of undue influence arises.[47]

Regrettably, after issuing this useful admonition, the court became an apologist for the particular attorney whose conduct was in issue:

> There is no rule that attorneys should never draw wills in which they receive gifts. There is nothing improper in an attorney's drawing wills for his family or for relatives, provided the gift to him is reasonable under the circumstances. Similarly, there is nothing improper in drawing wills for close friends or for clients if the gift to the attorney is a modest one. [Citation omitted.] As the instant case suggests, however, attorneys take a grave risk in drawing wills in which they receive more than a modest gift that is in keeping with the nature of the relationship they have with the client. Petitioner took this risk, unwisely, and one consequence was that he lost the substantial gift in Mrs. Rohde's will when it was contested.[48]

The California court obviously felt that the loss of the legacy was punishment enough. The rationale for this conclusion is, however, difficult to comprehend. If the only "risk" for the attorney-draftsman is loss of the legacy, without need for concern about possible disciplinary measures, then attorneys who are in a position to unduly influence their clients have little to lose by drafting wills that include gifts for themselves. If a will is not challenged or if it is contested and the legacy to the attorney is upheld, then so much the better.[49] But, even if a contest is successful and the legacy is overturned by reason of undue influence, the scrivener is not any worse off financially than if the attorney had not improperly influenced the client at the outset.[50]

The decision in *Magee* is also of interest because of the court's indication that the only evidence of the reason for the client's *inter vivos* gift of $4,500 in cash to her

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47. *Id.* at 431, 374 P.2d at 812, 24 Cal. Rptr. at 844.

48. *Id.* at 433, 374 P.3d at 813, 24 Cal. Rptr. at 845.

49. Of course, innumerable reasons that have nothing to do with the merits of a suit might persuade a testator's heirs or beneficiaries not to contest a bequest to the attorney-draftsman. For instance, the heirs or beneficiaries might not have sufficient funds to finance such a suit, including the expense of hiring a lawyer who might be hesitant to take the case on a contingent fee basis. *See generally* 3 PAGE ON WILLS, *supra* note 26, at § 26.148 (excellent discussion of the many open questions about the award of attorney's fees in a successful will contest). Disgruntled heirs and beneficiaries may also be reluctant to undertake a will contest because often they are not experienced in business pursuits and thus may be hesitant to file suit and undergo the rigors of a trial. Further, if the heirs or beneficiaries live in a different section of the country than where the testator's will is being probated, this would undoubtedly increase the burden of bringing suit. Also, if the bequest to the attorney-draftsman was not substantial, then the other beneficiaries under the will might feel that it would not be worth the effort to challenge the gift, no matter how offensive and unethical the attorney's conduct may have been.

50. The word "financially" is used advisedly, for a lawyer who is the object of a will contest based on undue influence may suffer, even if the contest were ultimately settled or decided in the attorney's favor at trial, in many tangible and intangible ways from the publicity associated with the proceeding. *Cf.* O'Hara, *Sued!—Not Me, I'm A Lawyer*, 40 KY. BENCH & B. 28 (Oct. 1976) (discussing the anxieties, adverse publicity, and other problems that a lawyer might face as a defendant in a legal malpractice suit).

attorney,[51] and the only direct evidence of what transpired during the crucial ten or fifteen minute period when the testatrix met with the attorney to discuss the provisions of her proposed will, was the lawyer's testimony at trial.[52] This highlights the inherent problem in situations in which an attorney has drafted a will in which he or she is named as beneficiary. In almost all instances, the testator has passed away by the time the propriety of the attorney-draftsman's conduct is questioned,[53] and the lawyer's testimony often goes uncontradicted.

2. State v. Horan

The more modern view, which holds attorneys to a much higher degree of accountability in will drafting situations, has been spearheaded by the decision of the Supreme Court of Wisconsin in *State v. Horan*.[54] That decision, which remains a leading case in the field, was decided two decades ago, just a year after the California Supreme Court held in *Magee* that an attorney-draftsman was not subject to discipline even though a will contest jury had previously found that he had unduly influenced his client into making him a substantial beneficiary of her estate.

In *Horan*, an attorney drafted six wills and a codicil for an eighty-seven-year-old client who was also a close friend. Under each succeeding instrument the legacies to the attorney grew larger, at the expense of the other beneficiaries, until the attorney's share was in excess of $50,000 of a $265,000 estate.[55] After noting that the then applicable Canons of Professional Ethics[56] did not expressly cover the situation in which an attorney-draftsman was named as a beneficiary in a will, the court openly rejected the position set forth by the ABA Committee of Professional Ethics and Grievances[57] and espoused by two leading scholars[58] that condoned this conduct in broad, undefined circumstances and simply suggested that it would be desirable in such situations to have another attorney review the document prior to execution. Instead, the court in *Horan* adopted a comprehensive prohibition because of the inherent conflict of interest between the attorney and the client in such circumstances, the resulting incompetence of an attorney to testify in support of the will's admission

51. Magee v. State Bar of Cal., 58 Cal. 2d 423, 428, 374 P.2d 807, 810, 24 Cal. Rptr. 839, 842 (1962). The attorney was the subject of disciplinary proceedings not only for his conduct in preparing a will in which he was named as the residuary beneficiary, but also for accepting a substantial cash gift from his client. The client allegedly gave the money to the attorney because she already had enough for her needs and thought that since he would be getting it under her will, he might as well have it early. *Id.*

52. *Id.* at 426–27, 374 P.2d at 809, 24 Cal Rptr. at 841.

53. *See supra* notes 17–18 and accompanying text.

54. 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

55. *Id.* at 68, 123 N.W.2d at 489.

56. *Id.* at 70–71, 123 N.W.2d at 490. The Canons of Professional Ethics were adopted by the American Bar Association in 1908 and remained in force until the Code of Professional Responsibility became effective in 1970. The portions of the Canons referred to by the court in *Horan* were Canon 6 (prohibiting representation of "conflicting interests" except by express consent) and Canon 11 (proscribing an attorney's taking advantage of a client for that attorney's own "personal benefit or gain"). *Id.*

57. *See Id.* at 70–71, 123 N.W.2d at 490; ABA Comm. on Professional Ethics and Grievances, Decision 266, at 641 (1957).

58. *See* State v. Horan, 21 Wis. 2d 66, 70–71, 123 N.W.2d 488, 490 (1963); H. DRINKER *supra* note 9, at 94; M. ORKIN, LEGAL ETHICS 104 (1957).

to probate, the possibility of harm to other beneficiaries arising from the attorney's actions, and the undermining of the public's confidence in the integrity of the legal profession.[59] The court, however, excepted one particular situation from its general prohibition against an attorney's dual role as draftsman and beneficiary, and this exclusion has been reaffirmed in numerous decisions[60] and incorporated into the provisions of the new ABA Model Rules of Professional Conduct.[61] According to the court:

> We do not mean to state that a lawyer may never draw a will for a personal friend or members of his family or close relatives in which he or a member of his family is a beneficiary. *A lawyer may draft a will for his wife, his children, or his parents, or other close relatives, in which he is a beneficiary* and stands in the relationship to the testator as one being the natural object of the testator's bounty.[62]

Recognizing that its decision was turning new ground, that the bar had not previously given the matter adequate consideration, and that there was no indication of undue influence on the part of this particular attorney, the court felt that a reprimand and costs of the proceeding would be sufficient discipline under the circumstances.[63]

3. State v. Collentine

Five years later, the Wisconsin Supreme Court had an opportunity in *State v. Collentine*[64] to review the *Horan* decision. Because of its concern that the conduct of the lawyer in question was arguably within the letter of the exception set forth in *Horan,* the court reluctantly concluded that discipline was not warranted.[65] The court warned, however, that the actual innocence of a lawyer in a particular situation would not overcome the detriment to the legal profession caused by such conduct, and therefore decided to restrict its earlier ruling:

> In order to prevent future misunderstandings, we conclude and establish as a rule for prospective application that a lawyer may be the scrivener of a will in which he is a beneficiary only when he stands in relationship to the testator as the natural object of the testator's bounty and where under the will he receives no more than would be received by law in the absence of a will. Under any other circumstances in which the lawyer-draftsman is a beneficiary, this court will conclude that the preparation of such a will constitutes unprofessional conduct.
>
> When a testator wishes to have his attorney draft a will in which that attorney is entitled to anything more than he would be at law, it is the absolute duty of the attorney to refuse to act. He has the responsibility of advising his client to consult another attorney if he wishes to pursue such a bequest. While adherence to this standard will result in

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59. State v. Horan, 21 Wis. 2d 66, 70, 123 N.W.2d 488, 490 (1963).

60. *See, e.g.*, Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); State v. Gulbankian, 54 Wis. 2d 599, 196 N.W.2d 730 (1972); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1983).

62. State v. Horan, 21 Wis. 2d 66, 75, 123 N.W.2d 488, 492 (1963) (emphasis added).

63. *Id.*

64. 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

65. *Id.* at 330–31, 159 N.W.2d at 53.

> occasional inconvenience to members of the bar, the problems that are inherent in the drawing of an unnatural will far outweigh such inconveniences. . . .
>
> In *Horan*, the door was left ajar to permit unnatural wills in certain circumstances. By this opinion, that door is closed.[66]

In the fifteen or so years since *Collentine*, the courts in Wisconsin[67] and elsewhere[68] have become noticeably more rigorous in disciplining attorneys who have drafted wills in which they have been named as beneficiaries. Of course, considerable correlation exists between the reprehensiveness of an attorney's conduct and the discipline mandated,[69] but beyond this factor there is no question that lawyers in similar situations are held to a much higher standard of accountability than was the case a decade or two ago.[70] Clearly, the admonishments and reprimands of the 1950s and 1960s have become the suspensions and disbarments of the 1970s and 1980s. Even in two recent decisions in which the courts have consciously adopted a less stringent rule than that espoused in *Horan* and *Collentine*, the facts were considerably more sympathetic to the attorney's position than is usual.[71]

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66. *Id.* at 332–33, 159 N.W.2d at 53–54.

67. *In re* Gonyo, 73 Wis. 2d 624, 245 N.W.2d 893 (1976); State v. Gulbankian, 54 Wis. 2d 599, 196 N.W.2d 730 (1972). *See also* State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972). In this, the second disciplinary action brought against the Gulbankian firm, the Wisconsin Supreme Court was highly critical of a number of estate planning practices employed by the Gulbankians, including designation of themselves as executors and attorneys for the estate in their clients' wills.

68. *In re* Krotenberg, 111 Ariz. 251, 527 P.2d 510 (1974) (6 month suspension); *In re* Saladino, 71 Ill. 2d 263, 375 N.E.2d 102 (1978) (3 month suspension even though client suffered no financial loss); Committee on Professional Ethics v. Sylvester, 318 N.W.2d 212 (Iowa 1982) (indefinite suspension); Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979) (past president of ABA disbarred), *cert. denied*, 446 U.S. 946 (1980); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa) (indefinite suspension for violation of an Ethical Consideration), *appeal dismissed*, 444 U.S. 805 (1979); Estate of Karabatian v. Hnot, 17 Mich. App. 541, 170 N.W.2d 166 (1969) (bequest to attorney-draftsman under prior will held contrary to public policy and therefore void); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976) (one year suspension and return of executor's and attorney's fees totaling $84,500).

69. See, *e.g.*, Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 844–46 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979), in which the attorney-draftsman took advantage of a wealthy brother and sister in their eighties, who were in poor health and had no close family ties. The attorney received an *inter vivos* gift of $7,500 from his clients, and was a contingent beneficiary of $320,000 that would be payable to him in the event the 85-year-old sister predeceased the testator. To make matters worse, within a period of three years immediately preceding the brother's death, the brother and sister changed lawyers several times and each time a different lawyer prepared their wills, Behnke's legacy disappeared only to reappear, in substantial amounts, in each succeeding will that Behnke prepared. *See also* Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 436–39, 366 A.2d 563, 565–66 (1976). In *Walker* the attorney-draftsman prepared a series of wills for an 88-year-old woman designating himself and his father coexecutors (in which capacities they received fees totaling $95,000). The attorney-draftsman subsequently appointed himself attorney for the estate (for which he received another $22,000), and was a residuary beneficiary of $239,000 under the terms of the will. If this conduct was not bad enough, after the testator's death, Walker actively discouraged the other beneficiaries from consulting independent counsel to advise them of their rights. Moreover, he was guilty of a conflict of interest as executor and counsel for the estate in settling claims against the estate in order to preserve his favorable status as beneficiary. *Id.* at 439–44, 366 A.2d at 566–69.

70. *Compare* Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979) *and* Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976), *with* Magee v. State Bar of Cal., 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962) (disciplinary proceeding dismissed in spite of prior suit in which the attorney's conduct was held to constitute undue influence over an 81-year-old woman in declining health) *and* Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972) (mere public reprimand given even though testatrix was elderly, was in poor mental health, and had seen the attorney on only one prior occasion before designating him remainderman of her entire estate in the will that he drafted).

71. *See, e.g.*, Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981). *See also* Legal Ethics Inquiry 83–3 (W. Va.), *reported in* 6 W. VA. ST. B.C.L.E. BULL. No. 16 (Mar. 21, 1983).

4. Committee on Professional Ethics v. Behnke

The most significant decision that has been rendered in the years after *Horan* and *Collentine* is the Iowa Supreme Court's milestone opinion in *Committee on Professional Ethics v. Behnke*.[72] The facts in *Behnke* were no more egregious than those in a number of other disciplinary proceedings that had previously been brought.[73] In *Behnke*, however, the lawyer argued vigorously that even if he had violated the provisions of EC 5-5 of the Code of Professional Responsibility,[74] his conduct would not provide a basis for disciplinary action since Ethical Considerations are intended only to be aspirational.[75] The Iowa Supreme Court rejected the attorney's position, holding that "violation of an ethical consideration, standing alone, will support disciplinary action."[76] The court then suspended the attorney's license for a minimum of three years.[77]

Because the attorney's conduct in *Behnke* was inexcusable, the discipline that was ordered is understandable, and the court should be commended for its efforts to impose high ethical standards on attorneys practicing in that jurisdiction. But the court's decision is tainted by its conclusion that a violation of an Ethical Consideration, by itself, provides an adequate basis for disciplinary action.[78]

The Preliminary Statement in the ABA-approved version of the Code of Professional Responsibility explains that the Disciplinary Rules provide "a basis for disciplinary action,"[79] and that the Ethical Considerations are "aspirational,"[80] pro-

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72. 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979).

73. *See supra* note 69. *Cf. In re* Saladino, 71 Ill. 2d 263, 375 N.E.2d 102 (1978); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972); *In re* Moore, 218 Or. 403, 345 P.2d 411 (1959); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976).

74. EC 5-5 provides:

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1983).

75. Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 840 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979).

76. *Id.* at 840, 846. In the process, the Iowa Supreme Court relied on five earlier Iowa cases in which attorneys had been disciplined for violation of ethical considerations, but the court then admitted that the lawyers in those other cases "were not disciplined for ethical considerations violations alone . . . . " *Id.* at 840.

77. *Id.* at 846.

78. Due process may entitle lawyers to some warning of the rules which, if violated, will result in disciplinary action. In this regard, the applicable sections of the Iowa Code of Professional Responsibility may have been misleading, since EC 5-5 is the only provision dealing directly with improprieties inherent in an attorney's preparing a will in which he or she is named as a beneficiary, and the Ethical Considerations may not be intended to form a basis for disciplinary action. *See infra* notes 79–83 and accompanying text. However, the Court of Appeals for the Eighth Circuit expressly rejected this position and revoked, on the basis of EC 5-5, an attorney's license to practice before that court. Randall v. Reynoldson (*In re* Randall), 640 F.2d 898, 905 (8th Cir. 1981) (discussed *infra* text accompanying notes 89–90). *See generally In re* Ruffalo, 390 U.S. 544 (1968) (a leading case on the due process requirements applicable in attorney disciplinary proceedings). This problem has been resolved in Iowa, at least, where the substance of EC 5-5 has been transferred to a new disciplinary rule, DR 5-101(B). *See* Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 840 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979).

79. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1983).

80. *Id.*

viding "objectives toward which every member of the profession should strive."[81] Iowa, however, is one of a handful of states that omitted the Preliminary Statement when it enacted the ABA Code of Professional Responsibility.[82] While this could help explain the conclusion in *Behnke* that violation of an Ethical Consideration can result in the imposition of discipline, the court did not attempt to justify its decision on that basis.[83] Fortunately, the new Model Rules of Professional Conduct, with its "Restatement" format, avoids the dilemma presented by the Code's division into Disciplinary Rules and Ethical Considerations.[84]

Any doubt that the Iowa Supreme Court meant what it said in *Behnke* was extinguished eight months later when the same court decided *Committe on Professional Ethics v. Randall*,[85] which also dealt with the propriety of drafting a will in which the attorney was named as a beneficiary. The court again asserted its position that a violation of EC 5-5 could provide the basis for disciplinary action, and then added: "We have passed from the era in which it can be argued it is professionally acceptable for a lawyer to draw a client's will in his own favor unless undue influence can be shown. We made this clear in *Behnke*. . . ."[86] On the basis of the evidence[87] and the court's reaffirmation of its holding in *Behnke*, John D. Randall, a past president of the American Bar Association, had his license to practice revoked.[88] The same issues then made their way to the U.S. Court of Appeals for the Eighth Circuit, where Randall challenged his disbarment from practice before that court.[89] In response to the attorney's contention that a violation of EC 5-5 was not grounds for disciplinary action, the court of appeals threw its considerable weight behind the rationale of the Iowa Supreme Court:

> Randall's contention that violations of ethical canons could not lead to professional discipline, as that would be violative of due process, is not well taken. Ethical con-

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81. *Id.*

82. IOWA CODE at 3545 (1979). *See also* GA. CODE ANN. tit. 9, app. pt. III (1973); LA. REV. STAT. ANN. tit. 37, ch. 4 app. art. XVI (West 1974); TEX. REV. CIV. STAT. ANN. tit. 14, app. art. 12 (Vernon 1973); VT. STAT. ANN. tit. 12, app. 9 (Supp. 1983). Several other states have adopted the ABA's Disciplinary Rules, but have omitted the Ethical Considerations as well as the Preliminary Statement. *See, e.g.*, N.M. STAT. ANN., 2 Judicial Volume, Pamphlet 11 (1982); 11 OKLA. STAT. ANN. tit. 5, ch. 1, app. 3 (West 1982).

83. The court in *Behnke* made no reference to the fact that the Iowa Code of Professional Responsibility does not include the ABA's Preliminary Statement. This may be attributable to the confusion that existed as to whether the ABA's Preliminary Statement had been adopted in that state. For example, West's Iowa Code Annotated, 40 IOWA CODE ANN. § 610 app. (1975) includes the Preliminary Statement as part of Iowa's Code of Professional Responsibility, but the official Code of Iowa correctly omits the Preliminary Statement. IOWA CODE at 3545 (1979). Iowa's failure to include the Preliminary Statement appears to be inexplicable, and the omission may have been inadvertent. However, the basic purpose in dividing the Code of Professional Responsibility into Disciplinary Rules and Ethical Considerations, to provide rules for disciplinary purposes and ethical guidelines for general use, is obvious from the format and terminology of the Code. This would appear to be true even when that purpose is not made explicit because of the deletion of the Preliminary Statement. For a detailed discussion of these points, see Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, 65 IOWA L. REV. 1386, 1387–93, 1387 n.9 & 1391 n.43 (1980).

84. For an excellent discussion of the reasons behind the decision to forego the Code of Professional Responsibility's format of Canons, DRs, and ECs in favor of the Model Rule's Restatement organizational structure, see MODEL RULES OF PROFESSIONAL CONDUCT Chairman's Introduction (Proposed Final Draft 1981).

85. 285 N.W.2d 161 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980).

86. *Id.* at 165.

87. *Id.* at 161–64.

88. *Id.* at 165.

89. Randall v. Reynoldson (*In re* Randall), 640 F.2d 898 (8th Cir. 1981).

siderations are more than aspirational and are mandatory. . . . Furthermore, it appears that the prohibition contained in EC 5-5, prohibiting the drafting of a will by an attorney making himself a beneficiary, is but the current articulation of a long-standing prohibition against that practice. Obviously such a situation is fraught with a high potential for overreaching and abuse. The prohibition in EC 5-5 is also only a restatement of old Canon 9, Canons of the American Bar Association.[90]

C. *Propriety of "Modest" Bequests*

Limited authority in a couple of older cases indicates that a "modest" bequest to an attorney-draftsman does not form a sufficient basis to support a claim of undue influence.[91] By analogy, this type of testamentary gift would not provide grounds for disciplinary action against the attorney who drafted and was named in the will.[92] Dicta in several decisions provides additional support for a modest bequest exception. Thus, in *Magee v. State Bar of California*,[93] the court stated that "there is nothing improper in drawing wills for close friends or for clients if the gift to the attorney is a modest one."[94] This statement, however, was not applicable to the facts in *Magee*, where the attorney-draftsman, as sole residuary legatee, received $21,000 — an amount that constituted all but a few thousand dollars of the testatrix's entire estate.[95] In *State v. Horan*[96] the court phrased the issue in terms of whether an attorney could ethically draw a will in which he or she is named as a "substantial beneficiary,"[97] and later stated that an attorney's integrity would be questioned if he or she drew a will that contained "more than a token or modest bequest."[98] In *State v. Gulbankian*,[99] the court disciplined an attorney for preparing a will in which her sister received a $10,000 legacy, and held that "a bequest of $10,000 is not a token or modest bequest in an estate of $180,000. . . ."[100]

EC 5-5 of the Code of Professional Responsibility does not contain any language that would support a contention that the preparation of a will including only a "modest" or "token" gift to the scrivener would not constitute unethical conduct.[101] Furthermore, a number of reported disciplinary and will contest proceedings found attorneys guilty of improper conduct for drawing wills in which they were named as beneficiaries, even though the bequests in question could easily be described as

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90. *Id.* at 905.

91. Haughian v. Conlan, 86 A.D. 290, 83 N.Y.S. 830 (1903); *In re* Suydam's Will, 91 N.Y. Sup. Ct. (84 Hun) 514, 32 N.Y.S. 449 (1895), *aff'd*, 152 N.Y. 639, 46 N.E. 1152 (1897).

92. *See* State v. Gulbankian, 54 Wis. 2d 599, 602, 196 N.W.2d 730, 731 (1972). *See supra* notes 26–30 and accompanying text for a discussion of the similarity of issues in undue influence and disciplinary cases based on an attorney's conduct in drafting a will in which he or she is named as a beneficiary.

93. 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).

94. *Id.* at 433, 374 P.2d at 813, 24 Cal. Rptr. at 845.

95. *Id.* at 427, 374 P.2d at 809, 24 Cal. Rptr. at 841.

96. 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

97. *Id.* at 69, 123 N.W.2d at 489.

98. *Id.* at 75, 123 N.W.2d at 492.

99. 54 Wis. 2d 599, 196 N.W.2d 730 (1972).

100. *Id.* at 602–03, 196 N.W.2d at 731.

101. EC 5-5 is quoted in full *supra* note 74. Nothing in the history of the adoption of EC 5-5 indicates that any consideration was given to inclusion of an exception for a token or modest bequest to the scrivener. *See* ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 191–92 (1979).

modest. In *State v. Collentine*,[102] for instance, an attorney who was named as the residuary beneficiary was admonished for his conduct despite the insolvency of the estate and the attorney's knowledge of the insolvency when he drafted the will.[103] The *Collentine* court also appeared to retract that portion of its earlier opinion in *Horan* relating to "token or modest" bequests.[104] Furthermore, in several recent decisions in which the legacy in question did not seem to be large, the courts still found the drafting attorney guilty of misconduct.[105]

By an amendment to Rule 1.8(c) of the Model Rules of Professional Conduct adopted by the American Bar Association in August 1983, however, what had been a prohibition of "any" gift to an attorney-draftsman or a member of that attorney's family was changed to prohibit only "substantial" gifts.[106] This modification makes a basic and significant change in the applicability of Rule 1.8(c), and breathes considerable new life into the modest or token bequest exception. As a consequence of this amendment prohibiting only "substantial" gifts to drafting lawyers, the Model Rules will, unfortunately, reduce the ethical proscription to a point below that established by EC 5-5, which contains no similar limitation.[107]

Even in the absence of specific provisions like those in Rule 1.8(c) of the Model Rules, an attorney might not be subject to disciplinary action in every instance in which he or she drafted a will containing a token bequest to the draftsman. If the gift can truly be described as de minimus, it is unlikely that the decedent's heirs or beneficiaries would be sufficiently upset by the legacy to complain to the disciplinary authorities or to file a will contest challenging the particular disposition. But what is a modest gift to one person may well be substantial to another, and thus an attorney-draftsman may find that he or she is more vulnerable than anticipated by acceding to a client's wishes and including what is believed to be a small bequest to himself or herself. In addition, even an object intended only as a token of the testator's appreciation, like a small cash bequest, an old piece of furniture, or an oil painting, may well be viewed by others, after the testator's death, as the direct result of overreaching during the attorney-client relationship.[108] Thus, the appearance of impropriety is

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102. 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

103. *Id.* at 328–31, 159 N.W.2d at 51–53.

104. *Id.* at 332–33, 159 N.W.2d at 53.

105. Committee on Professional Ethics v. Sylvester, 318 N.W.2d 212 (Iowa 1982) (attorney-draftsman's license to practice suspended indefinitely for being named as one of 32 beneficiaries); Shaffer v. Graham (*In re* Estate of Lawson), 75 A.D.2d 20, 428 N.Y.S.2d 106 (1980) (attorney-draftsman received a $20,000 bequest out of an estate of $150,000).

106. For the full text of Rule 1.8(c) see *supra* text accompanying note 19. *See also supra* note 20 and accompanying text for a discussion of this change.

107. Compare the provisions of Rule 1.8(c) with the precise terms of EC 5-5.

108. One would expect that beneficiaries of an estate might disagree whether a bequest to an attorney was "modest," because of the emotion involved in the inheritance of a friend's or relative's estate, but it is significant that judges differ considerably on this issue. Thus, in Haughian v. Conlan, 86 A.D. 290, 83 N.Y.S. 830 (1903), although the attorney-draftsman was the recipient of $10,000 in cash and $1,200 in stock out of an estate of $225,000, the court was not troubled by the attorney's conduct:

> As to the charge of undue influence, we find nothing to support it except the fact that [the attorney-draftsman] received a legacy of $10,000 thereunder and also ten shares of the capital stock . . . which he afterwards sold for $1,200. This is utterly insufficient to warrant the inference of undue influence. . . . In the case at bar the value of the estate appears to have been at least $225,000 and the amount of the legacy to [the

likely to exist whenever a testamentary gift is left to the attorney who drafted the will.[109] Under these circumstances and in view of all of the potential problems that can result, it is clearly preferable to have an ethical rule that prohibits an attorney from preparing a will containing any bequest or devise to the draftsman — without exception for token or modest testamentary gifts.

D. *Ethics Opinions Dealing with the Draftsman-Beneficiary*

In addition to the reported cases, a number of published ethics opinions deal with various aspects of the problems presented when an attorney drafts a will in which he or she is named as a beneficiary.[110] As might be expected, the opinions vary from jurisdiction to jurisdiction, with some taking a more lenient approach along the lines of the provisions of EC 5-5,[111] and others, particularly those issued by the Wisconsin Committee on Professional Ethics, following a course consistent with the holdings in *Horan* and *Collentine*.[112] All of the published opinions tend to discourage this conduct, and the differences in attitude are primarily attributable to the extent of the exceptions that are recognized and permitted.[113]

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attorney-draftsman] was not so disproportionately large as to suggest the exercise of any improper solicitation or control on his part.

Id. at 292–93, 83 N.Y.S. at 832. *But see* State v. Gulbankian, 54 Wis. 2d 599, 196 N.W.2d 730 (1972), a disciplinary action in which a will prepared by an attorney contained a $10,000 bequest to the draftsman's sister out of a $180,000 estate. Under these similar circumstances, the Wisconsin court was clearly more concerned by the attorney's conduct than its counterpart in *Haughian* had been:

> The complaint against [the attorney-draftsman] claims she acted in an unprofessional manner in drafting the will because it gave a substantial bequest to her sister . . . .
>
> . . . .
>
> Although the referee has found no ill intent on behalf of [the attorney-draftsman] in preparing this will, we find a bequest of $10,000 is not a token or modest bequest in an estate of $180,000 . . . .

Id. at 601–03, 196 N.W.2d at 731. Notwithstanding that *Haughian* involved a will contest in which undue influence was charged, whereas the Wisconsin action was a disciplinary proceeding, and that the New York case was decided some 70 years prior to the *Gulbankian* decision, when courts, in general, were considerably more lenient in their disposition toward such conduct, the difference in judicial attitudes is still significant.

109. The courts have shown particular concern about the appearance of impropriety in evaluating conduct in which an attorney is named as a beneficiary in a will that he or she drafted. *See supra* notes 7–8 and accompanying text.

110. ABA Comm. on Professional Ethics and Grievances, Informal Opinion 1145 (1970); Opinion 74–24, 3 ARIZ. ST. B. NEWSLETTER 3 (Nov. 1974), *reported in* MARU 1975, *supra* note 12, at 70, No. 7626; Opinion 367, 60 ILL. B.J. 73 (1971); Informal Opinion 89, 57 MICH. ST. B.J. 311 (Special Issue, Feb. 1978), *reported in* MARU 1980, *supra* note 12, at 289, No. 11520; Opinion 840 (Oct. 25, 1973), N.C. ST. B. II–266, *reported in* MARU 1975, *supra* note 12, at 420, No. 9591; Opinion 71, 16 TEX. B.J. 223 (Apr. 1953); Informal Opinion I–3, 32 WASH. ST. B. NEWS 27 (Jan. 1978), *reported in* MARU 1980, *supra* note 12, at 582, No. 13035; Opinion E–80–1, 53 WIS. B. BULL. 79 (Apr. 1980); Memorandum Opinion 6–77, 52 WIS. B. BULL. 93 (Supp. June 1979), *reported in* MARU 1980, *supra note* 12, at 613, No. 13186; Informal Opinion B–1968, 47 WIS. B. BULL. 38–39 (Supp. Dec. 1974), *reported in* MARU 1975, *supra* note 12, at 501, No. 10189; Informal Opinion 1963–4 (L.A. County, Cal.), L.A. ETHICS OPINIONS, *supra* note 12, at 71, *reported in* MARU 1975, *supra* note 12, at 103, No. 7794.

111. *See, e.g.*, ABA Comm. on Professional Ethics and Grievances, Informal Opinion 1145 (1970) (relying on "exceptional circumstances" language of EC 5-5); Opinion 74–24, 3 ARIZ. St. B. Newsletter 3 (Nov. 1974), *reported in* MARU 1975, *supra* note 12, at 70, No. 7626 (also employing the "exceptional circumstances" terminology); Opinion 367, 60 Ill. B.J. 73 (1971) (quoting from H. DRINKER, *supra* note 9, at 94).

112. *See* State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968). *See also* Opinion E–80–1, 53 WIS. B. BULL. 79 (Apr. 1980); Opinion 3–67, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 613, No. 13186; Informal Opinion B–1968, 47 WIS. B. BULL. 38–39 (Supp. Dec. 1974), *reported in* MARU 1975, *supra* note 12, at 501, No. 10189.

113. *Compare, e.g.*, Opinion 74–24, 3 ARIZ. ST. B. NEWSLETTER 3 (Nov. 1974), *reported in* MARU 1975, *supra* note 12, at 70, No. 7626 *and* Opinion 367, 60 ILL. B.J. 73 (1971) *with* Opinion E–80–1, 53 WIS. B. BULL. 79 (April 1980).

In general, the ethics opinions issued in the last ten years seem to be more tolerant than court decisions rendered during the same period, but this disparity may be more apparent than real. Many of the court decisions involve egregious conduct that literally cries out for disciplinary action,[114] and it is not surprising to see the courts taking a hard line in these cases.[115] On the other hand, the underlying facts in the ethics opinions are either extremely limited or generally favorable to the attorney's position, and none involve the sort of flagrant conduct that is often noted in judicial decisions.[116] This distinction is undoubtedly due to the difference in the forums. Disciplinary proceedings are based on the presentation of evidence both for and against the lawyer who has been charged, and as a consequence the attorney's conduct is not always presented in the best possible light.[117] In contrast, ethics opinions are advisory in nature and are derived from an *ex parte* factual narrative posed by a member of the bar in which the lawyer's activity, not surprisingly, is described in a more generous fashion.[118]

Several of the ethics committee opinions are particularly noteworthy because they consider important issues that have not been resolved by the cases. For instance, in Informal Opinion 1145, issued in 1970, the ABA Committee on Professional Ethics and Grievances relied on the "exceptional circumstances" terminology in EC 5-5 in ruling that a lawyer-spouse could ethically draft a will for a nonlawyer-spouse, even though the draftsman stood to receive more than an intestate share under the terms of the will.[119] In reaching this conclusion, the committee quoted extensively from the holding in *State v. Horan*,[120] and thus was able to "reconcile" the familial and professional responsibilities of a lawyer.[121] Inexplicably, the opinion made no reference to the later Wisconsin Supreme Court decision in *State v. Collentine*,[122] which was decided two years before the ABA opinion and which specifically modified *Horan* to allow an attorney to draft this type of will only when his or her portion would be no greater than an intestate share. By way of comparison, in 1968 the Committee on Professional Ethics of the Wisconsin State Bar relied on *Collentine* in finding that it would be improper for a lawyer to draft a will for a spouse that contained a bequest equal to the maximum marital deduction, since that could exceed

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114. *See supra* note 69.

115. For a summary of the disciplinary action taken by the courts in the last decade, see *supra* notes 67–70.

116. *See, e.g.*, Opinion 367, 60 ILL. B.J. 73 (1971). In that opinion, the facts provided to the Ethics Committee, even in a fairly complex situation, were limited:

> A lawyer whose father recently died has been asked by his stepmother to draw a new will for her deleting his deceased father as principal beneficiary and naming the lawyer as executor and trustee of the assets of the estate. The trust assets are to be used for the support and education of three minor half-brothers and on the trust's termination the lawyer will share the remaining trust estate equally with his three half-brothers. The lawyer inquires if it is professionally proper for him to draw such a will and in addition poses certain legal questions to the Committee.

117. *See generally* L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 286–90 (1971).

118. *Id.* at 45; *see also* Cheatham & Lewis, *Committees on Legal Ethics*, 24 CALIF. L. REV. 28 (1935).

119. ABA Comm. on Professional Ethics and Grievances, Informal Opinion 1145 (1970).

120. 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

121. ABA Comm. on Professional Ethics and Grievances, Informal Opinion 1145 (1970).

122. 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

the draftsman's intestate share.[123] Similarly, in 1980, the same committee opined that the decided cases in its jurisdiction precluded an attorney in a law firm from drafting a will for the spouse of another lawyer in the same firm, when the will would leave the entire estate to the lawyer-spouse to the exclusion of children.[124] Apparently the Wisconsin Ethics Committee is unable to "reconcile" what may be inherently irreconcilable, and has decided to err in favor of high ethical standards at the expense of familial relationships.

On the basis of the reported cases and ethics opinions, the authorities appear to be in general agreement regarding the impropriety of a lawyer's conduct in preparing for a client a will in which the drafting lawyer is named as a beneficiary. Numerous court decisions attest to the fact that the attorney-client relationship can provide the means by which a lawyer, if so inclined, may be able to take advantage of that position and ingratiate himself or herself to the extent that the client-testator may "decide" to include the attorney in a will drawn, not coincidently, by the same individual.[125] If the decision to include the attorney as a beneficiary has been made as a result of the exercise of the testator's own free will, the bequest or devise would similarly be incorporated in a will drawn by another lawyer, who would be in a position to offer independent legal advice untainted by self-interest.[126] Admittedly, this could cause some inconvenience to a testator who simply wants to remember the lawyer in his or her will, but this is not an unreasonable price to exact in order to provide needed protection against the sort of overreaching that can easily occur in such situations. A single highly publicized instance where an attorney drafted a will in which he or she is named as a substantial beneficiary can undo innumerable good

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123. Informal Opinion B–1968, 47 WIS. B. BULL. 38–39 (Supp. Dec. 1974), *reported in* MARU 1975, *supra* note 12, at 501, No. 10189.

124. Opinion E–80–1, 53 WIS. B. BULL. 79 (Apr. 1980). The decision was based on the theory of "imputed disqualification." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1983).

125. *See, e.g., In re* Saladino, 71 Ill. 2d 263, 375 N.E.2d 102 (1978); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); *In re* MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960).

126. EC 5-5 provides in pertinent part: "Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1983). Also, when a will contains a legacy to the attorney-draftsman and the testator then changes lawyers and has another will prepared, the second will may omit any reference to the original attorney. *See, e.g.*, Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 844–45 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); Estate of Karabatian v. Hnot, 17 Mich. App. 541, 544, 170 N.W.2d 166, 168 (1969). If independent legal counsel is sought, then it is essential that the second lawyer is in fact independent in order for the legacy to the original attorney to withstand scrutiny. *In re* Moore, 218 Or. 403, 410, 345 P.2d 411, 414 (1959); Lyons v. Wilson (*In re* Lobb's Will), 173 Or. 414, 427–32, 145 P.2d 808, 813–14 (1944); Komarr v. Beaudry (*In re* Estate of Komarr), 46 Wis. 2d 230, 175 N.W.2d 473 (1970). *But cf.* Magee v. State Bar of Cal., 58 Cal. 2d 423, 426–30, 374 P.2d 807, 809–11, 24 Cal. Rptr. 839, 841–43 (1962).

The Supreme Court of North Dakota has succinctly explained the value of retaining independent counsel to draw a will in such circumstances:

> The purpose [for insisting that the client see another attorney] is that the client have independent advice and counsel. If, after receiving that independent advice and counsel, the testator remains steadfast in the desire to name the attorney as a beneficiary in the will, there should be little doubt that the will expresses the intent of the testator.

Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 441 (N.D. 1980).

deeds performed by other members of the bar in a particular community.[127] Under the circumstances, compelling reasons exist for the adoption of an ethical rule that contains a clear and concise prohibition which leaves no room for interpretation or manipulation.

E. *An Evaluation of EC 5-5 and Rule 1.8(c)*

Although EC 5-5 of the current Code of Professional Responsibility addresses the ethical problems inherent in situations where attorneys draft wills or trusts in which they have beneficial interests, its provisions should be mandatory. For example, no justification exists for providing that a lawyer "should not" suggest to a client that a gift be made to him or her, rather than unequivocally stating that a lawyer "shall not" make such a suggestion.[128] Furthermore, an attorney should not be given the leeway to argue that he or she was unsuccessful in urging the client to seek independent advice, therefore permitting the attorney-draftsman to be a beneficiary under a will or trust.[129] When the will becomes effective and the bequest or devise subject to challenge, death will have silenced the testator. The person who could best confirm where the idea for the legacy arose can no longer testify.[130] Thus, it is often the attorney's testimony alone that may be controlling on the all-important questions of the testator's motivation and mental capacity at the time of will execution.[131] The distinct possibility that the determinative issue may turn on an attorney's credibility in a situation fraught with self-interest is a sufficient reason, by itself, to consider all such conduct improper. Because the appearance of impropriety, if not actual impropriety, is blatant in such circumstances, the small amount of inconvenience involved in insisting that a client utilize the services of independent counsel seems well justified.

Even if certain exceptions are to be recognized in a rule prohibiting an attorney from drafting a will or trust in which he or she is named as a beneficiary, the "exceptional circumstances" language of EC 5-5 is totally inadequate because it is not defined or limited,[132] and the cautious practitioner is left to his or her own devices in determining when a client's will ethically can be drawn to include a bequest or devise to the draftsman. The overall format of the Code of Professional Responsibility simply compounds this problem; although EC 5-5 deals directly with the issue of

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127. *See* Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980); Randall v. Reynolds (*In re* Reynolds), 640 F.2d 898 (8th Cir. 1981) (prominent Iowa attorney and past president of the American Bar Association disbarred first from practicing in Iowa and then before the federal courts in the Eighth Circuit for his conduct in preparing a will in which he was the sole beneficiary of a millionaire's estate). See, *e.g.*, the reference to Randall in the cover story on "Why Lawyers Are in the Doghouse" that appeared in U.S. News & World Report, May 11, 1981, at 38.

128. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1983). *See also supra* note 15 and accompanying text.

129. *See supra* note 126. This argument has been made with some success in a number of cases. *See, e.g.*, State v. Richards, 165 Neb. 80, 95–96, 84 N.W.2d 136, 146 (1957); Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 441 (N.D. 1980); State v. Collentine, 39 Wis. 2d 325, 329–30, 159 N.W.2d 50, 52 (1968).

130. *See supra* notes 17–18 and accompanying text.

131. *See supra* note 18.

132. *See supra* note 16.

the drafting attorney as beneficiary, its proscription is seriously diluted because the Code, by its own terms, makes its Ethical Considerations "aspirational" only.[133] The decision of the Iowa Supreme Court in *Committee on Professional Ethics v. Behnke*[134] was able to avoid this dilemma, but attorneys in other jurisdictions should be able to rely on their ethics code's own statements concerning the consequences of conduct that falls short of breaching its disciplinary rules.[135]

The earlier versions of Rule 1.8(c) of the Model Rules of Professional Conduct represented a significant improvement over EC 5-5, but the current blanket exceptions to cover gifts that are less than substantial and situations in which the client is a relative of the attorney-beneficiary are needlessly broad.[136] For example, why should an attorney be permitted to prepare a will for a distant cousin when he or she is to be named as a beneficiary?

F. *An Approach Based on* Horan *and* Collentine

A better and more stringent approach might be posited on the ethical principles developed in the *Horan*[137] and *Collentine*[138] cases. These decisions prohibit an attorney from preparing a will in which he or she is designated as a beneficiary, except when the client is a close relative and the amount of the legacy to the attorney is no greater than an inheritance would have been if the client-relative had died intestate. This minor exception would allow an attorney to prepare a will in situations when it might be awkward, unfortunate, or unnatural if he or she had to refuse to perform such a service for a close family member. If a lawyer is married and has several children, it is arguable that he or she should be permitted to prepare a spouse's will under which the estate is to be divided in a manner similar to that provided for under the applicable statute of descent and distribution.[139] This rule would also permit a lawyer to draft wills for his or her parents, if the attorney's share did not exceed the intestate portion.[140]

Thus, the *Horan – Collentine* approach offers a reasonable compromise between high ethical standards and familial obligations. Certainly, the ethical problems arising from a conflict of interest or an appearance of impropriety are minimized in the limited situations when an attorney-beneficiary would be permitted to draft a will for a relative, but problems still exist. Even with these restrictions, the ethical concerns have not been totally resolved. If an attorney were to draw a will for a widowed mother under which her estate would be shared equally by the attorney and two siblings, exactly in the manner that the estate would be divided if the mother had died

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133. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1983).

134. 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979).

135. *See supra* text accompanying notes 74–84.

136. For the full text of Rule 1.8(c), see *supra* text accompanying note 19. For a discussion of the history of Rule 1.8(c), see *supra* notes 20–25 and accompanying text.

137. 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

138. 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

139. *See generally* T. ATKINSON, LAW OF WILLS 61–65 (2d ed. 1953).

140. *Id.* at 64–65.

intestate, there is still no assurance that the attorney did not take advantage of his or her fiduciary relationship. The draftsman may have included a bequest, albeit in the amount of an intestate share, that was greater than what he or she would have received had the mother had her will prepared by independent counsel.[141] After all, it is not unusual for testators to divide their estates along lines other than those specified in the intestacy provisions; the wills of parents do not always provide for equal treatment of offspring.[142] Even if equality was in fact desired by the testator, that would not necessarily overcome the appearance of impropriety that could result when the scrivener of a relative's will is named as a substantial beneficiary under its terms.[143] The ethical rule developed in *Horan* and *Collentine*, although a significant improvement over the provisions of the Code of Professional Responsiblity and the Model Rules of Professional Conduct, is more a realistic compromise than an all-purpose panacea.

G. *An Alternative Based on an All-Inclusive Prohibition*

Despite the benefits of the *Horan–Collentine* approach, much can be said for the adoption of a concise ethical provision that would prohibit the inclusion of an attorney-draftsman as a will or trust beneficiary without exception.[144] An absolute ethical restraint would serve the bar by providing an unambiguous rule of conduct uneroded by conditions or exclusions. One major disadvantage to such a rule is that a client would be put to the trouble of seeking new counsel if the testator wanted to include his or her original attorney as a beneficiary of a will or trust. It is difficult enough to persuade the public of the benefits of having a will drawn in order to avoid intestacy,[145] and it might be inadvisable to make the process any more burdensome, even when a client may desire to make a devise or bequest to the drafting attorney.

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141. Assume, for purposes of illustration, that a widowed mother was survived by three adult children who lived in the same general area of the country as their mother, and that one of these children was an attorney. Assume further that the mother's will, which was prepared by the child who was an attorney, split the estate into equal shares, exactly as if the mother had died intestate. If one of the children, however, had been much closer to the mother than the others, or had been in greater financial need, then it is possible that a will prepared by independent counsel, rather than the attorney-offspring, would have divided the estate in some other manner. Thus, the mere fact that a will disposes of property in the same manner as the applicable law of descent and distribution is hardly determinative of the ethical propriety of the draftsman's conduct. Of course, the risk of abuse is considerably less in the family setting. For a discussion of this point, see Hazard Letter, *supra* note 25.

142. This creates the need for statutory provisions regarding a spouse's forced share and children's rights as pretermitted heirs to provide protection against a testator's disinheritance of his or her family. 1 PAGE ON WILLS, *supra* note 26, at § 16.7; 2 PAGE ON WILLS, *supra*, § 21.05; T. ATKINSON, *supra* note 139, at 118–26, 138–46.

143. This would, of course, depend largely on the circumstances. But if the relative-draftsman was not particularly involved in the testator's day-to-day life, whereas other relatives were, and the estate was substantial, it would be difficult if not impossible to avoid some appearance of impropriety, even though the draftsman received only the share that he or she would have received if the decedent had died intestate. *See supra* note 141. Often, the true intentions of a testator are buried with the person, except as they may be reflected in the terms of the will. *See supra* text accompanying notes 17–18.

144. The original version of the Model Rules of Professional Conduct contained an absolute prohibition. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (Discussion Draft 1980) (quoted in full at *supra* note 22.).

145. *See generally* R. LYNN, *supra* note 3, at 77–81; Pedrick, *When Does the Estate Planning Team Huddle? (The Roles of the Several Estate Planning Professionals and the Nature of Their Relationship—In Fact)*, 5 INST. ON EST. PLAN. ¶ 71.1900, ¶ 71.1903 at 19–10 to 1–11 (1971); Wellman, *Selected Aspects of Uniform Probate Code*, 3 REAL PROP. PROB. & TR. J. 199, 206–07 (1968).

But if the initial lawyer were to explain the reasons behind the ethical prohibition, the client might gain an appreciation for the desire to instill a high level of integrity in the legal profession even though the testator may believe that this protection was unnecessary in his or her particular case. Further, inclusion of a gift to a drafting attorney is unusual enough that only a small fraction of all testators would be put to the inconvenience of seeking independent counsel.[146]

The real danger, of course, is that an attorney in these circumstances may lose the benefit of a legacy. Once the ethical prohibition is explained, it is possible that the testator would prefer to delete the gift rather than seek out the services of another attorney. The likelihood of a client reacting in this way would seem greatest when the legacy is small in value, and intended to serve only as a token of the client's appreciation.[147] While it can certainly be argued that clients should be permitted to show their gratitude, the application of an all-inclusive ethical rule that would preclude such legacies does not seem onerous. In other instances involving a more substantial legacy, a risk of losing that benefit would exist if a client were advised to go to another attorney, and, in the process of having that second lawyer prepare a will, the testator decided against inclusion of the testamentary gift to the original attorney.[148] Yet, this would prove the merits of utilizing independent counsel in order to be certain that such a legacy is the result of the testator's own gift-giving disposition.

It is not surprising that no direct precedents in the reported disciplinary cases support the imposition of an all-inclusive prohibition, because the Code of Professional Responsibility, including the provisions of EC 5-5, has been adopted to govern ethical conduct in a large number of jurisdictions.[149] Nevertheless, over the past decade or two[150] the courts have tended to impose serious disciplinary sanctions in cases involving attorney-beneficiaries for conduct that, no matter how offensive, might have escaped discipline in years past.[151] Additionally, the court in *Committee on Professional Ethics v. Behnke*[152] held that attorneys who draft wills in which they

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146. The Wisconsin Supreme Court spoke to this point in State v. Collentine:

> When a testator wishes to have his attorney draft a will in which that attorney is entitled to anything more than he would be at law, it is the absolute duty of the attorney to refuse to act. He has the responsibility of advising his client to consult another attorney if he wishes to pursue such a bequest. *While adherence to this standard will result in occasional inconvenience to members of the bar, the problems that are inherent in the drawing of an unnatural will far outweigh such inconveniences.* The inclusion of a clause making the scrivener a beneficiary is an invitation to a will contest and places in jeopardy the admission of a will that might otherwise go unquestioned . . . .

39 Wis. 2d 325, 332–33, 159 N.W.2d 50, 53–54 (1968) (emphasis added).

147. *See supra* text acccompanying notes 91–109 (discussing token or modest bequests).

148. As might be expected, this is often the case. *See supra* note 126.

149. *See* 2, 2(A), 2(B) NATIONAL REPORTER ON LEGAL ETHICS & PROFESSIONAL RESPONSIBILITY (1982) (containing the ethics codes of each of the 50 states and the District of Columbia, and demonstrating that the great majority of these jurisdictions have adopted verbatim the provisions of the ABA Code of Professional Responsibility).

150. *See supra* text accompanying notes 54–90 (discussing the trend toward the imposition of more stringent discipline in cases in which an attorney has drafted a will and is named a beneficiary therein).

151. *See supra* text accompanying notes 35–53 (discussing earlier disciplinary proceedings and the sanctions imposed).

152. 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979).

are named as beneficiaries are subject to high ethical standards; it determined that a violation of an Ethical Consideration provided a sufficient basis for imposing discipline. Thus, in the draftsman-beneficiary situation, the courts in recent years have indicated a willingness to adopt ethical principles that go considerably beyond the applicable provisions of the Code of Professional Responsibility and the Model Rules of Professional Conduct.

1. Estate of Karabatian v. Hnot

Private suits involving similar attorney conduct have also produced results that are consistent with an all-inclusive ethical prohibition. Numerous reported cases have relied on a presumption of undue influence when an attorney prepares a will and includes himself or herself as a beneficiary.[153] Moreover, the unparallelled decision in *Estate of Karabatian v. Hnot*[154] provides perhaps the closest analogy in private litigation to an absolute ethical restraint against attorneys drafting wills in which they are named as beneficiaries. In *Karabatian*, an attorney prepared a will under which he was to receive a $10,000 bequest and was designated as executor. Thereafter, the testator executed a second will, drawn by another lawyer,[155] which omitted the first attorney entirely.[156] Upon the testator's death, the attorney who drafted the first will contested the admission of the later will to probate. In granting the motion for a directed verdict in favor of the proponents of the second will, the trial judge questioned the ethics of the lawyer who designates himself or herself as a beneficiary in a will that he or she has drawn.[157] On appeal, the court not only condoned the trial judge's exercise of supervisory control over an attorney's professional conduct, but the court based its entire ruling on this ethical point:

> Apparently warnings [in earlier cases about the practice of drafting a will in which the scrivener is named as a beneficiary] do not suffice. If an attorney's conduct so violates the spirit of the lawyer's code of ethics, it also runs contrary to the public policy of this state. The bequest to contestant being void, he has no standing to contest the later will.[158]

Since the *Karabatian* court held, without the benefit of legislation, that a bequest to an attorney who drafted the underlying will is void as against public policy, the adoption of a comparable ethical rule prohibiting the drafting of all such wills would be a logical progression. Unfortunately, there is no indication that this action has been taken.[159]

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153. *See supra* note 27.

154. 17 Mich. App. 541, 170 N.W.2d 166 (1969).

155. *Id.* at 544–45, 170 N.W.2d at 168.

156. *Id.* at 544, 170 N.W.2d at 168.

157. *Id.* at 545, 170 N.W.2d at 169.

158. *Id.* at 546–47, 170 N.W.2d at 169.

159. *See* Informal Opinion 89, 57 MICH. ST. B.J. 311 (Special Issue, Feb. 1978), *reported in* MARU 1980, *supra* note 12, at 289, No. 11520, decided 9 years after Estate of Karabatian v. Hnot, 17 Mich. App. 541, 170 N.W.2d 166 (1969), in which it was held that an attorney may prepare a will for a family member absent any appearance of impropriety. *Karabatian* has not been widely followed in the fourteen years since it was decided. It has been cited on only four occasions, and only one of those decisions arguably relies on the case for its main proposition, that a violation of the

2. *Kansas' Statutory Prohibition*

Kansas, by statute, automatically invalidates a will drawn by a "confidential agent" or "legal adviser" if that person is "the sole or principal beneficiary" under the will.[160] The courts have construed the statute literally, holding that its application is limited to situations when an attorney-draftsman was the only beneficiary or received the largest legacy, thus excluding instances in which the attorney was simply a substantial beneficiary under the testator's will.[161] Even though this legislation has limited applicability, the policy reflected by its terms suggests that the statute could be expanded to vitiate *any* testamentary gift made to a lawyer or other "confidential agent" who drafts such a will.[162] But, even accepting this expanded application, it might be ill-advised to provide that an entire will would be invalidated, rather than just the bequest or devise in question. This would be comparable to the rule in a number of jurisdictions that excises any testamentary gift made to an individual who served as a witness, but otherwise leaves the will intact.[163] The Kansas statute, if extended in the suggested manner, would be analogous to an absolute prohibition precluding attorneys from drafting wills or trusts in which they are named as beneficiaries.

For all of these reasons, including, in particular, the trend of the courts in both disciplinary cases and will contest litigation toward a high standard of conduct when an attorney drafts a will or trust in which he or she is named as a beneficiary, a broad ethical prohibition against the inclusion of any gift in favor of the scrivener would, in

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code of ethics renders a will in which the drafting attorney was a beneficiary void as against public policy. People v. Green, 405 Mich. 273, 310, 274 N.W.2d 448, 462 (1979) (Levin, J., dissenting) (involving a violation of an ethical provision by a prosecuting attorney). The other three cases cite *Karabatian* for entirely different points. *In re* Estate of Small, 346 F. Supp. 600, 601 (D.D.C. 1972) (executor's fees); Estate of Vollbrecht v. Pace, 26 Mich. App. 430, 435, 182 N.W.2d 609, 612 (1970) (attorney's fiduciary relationship with testatrix); *In re* Estate of Koch, 259 N.W.2d 655, 660–61 (N.D. 1977) (testator not suffering from insane delusion by writing will that leaves out the attorney who was a beneficiary under a prior will). Professor Casner, however, discusses *Karabatian* in considerable detail. 2 A. CASNER, *supra* note 4, at 607.

160. KAN. STAT. ANN. § 59–605 (1976). The statute provides:

> If it shall appear that any will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall affirmatively appear that the testator had read or knew the contents of such will, and had independent advice with reference thereto.

Id.

161. *See, e.g.*, DiMaggio v. Powers (*In re* Estate of Barclay), 215 Kan. 129, 523 P.2d 376 (1974); Stunkel v. Stahlhut, 128 Kan. 383, 277 P. 1023 (1929); Kelty v. Burgess, 84 Kan. 678, 115 P. 583 (1911); *In re* Estate of Giacomini, 4 Kan. App. 2d 126, 603 P.2d 218 (1979).

162. In other words, if the policy behind the provisions of the statute renders the will invalid in the limited situation in which the will is prepared by a "confidential agent" or "legal adviser" who is named therein as the sole or principal beneficiary, then it would seem that the same policy should apply to invalidate a bequest or devise to *any* person who serves as "confidential agent" or "legal adviser," prepares the will, and receives a legacy thereunder. *See infra* text accompanying note 163. This would be analogous to an irrebuttable presumption of undue influence. If desired, an all-inclusive statutory prohibition could still include language like that in § 59–605, which provides an exception when the testator read or knew the contents of the will and received "independent advice" as to the provisions of the will.

163. *See generally* T. ATKINSON, *supra* note 139, at 315–17.

the long run, be beneficial to the public and the practicing bar.[164] Such a provision was initially included in the Model Rules of Professional Conduct, but was subsequently diluted by the inclusion of a number of exceptions and limitations.[165] Obviously, application of an all-inclusive ethical rule would cause some inconvenience in certain cases. But this is not too great a price to pay for the advantages of a prohibition that would be binding in all situations and would need little interpretation. Unfortunately, in all too many cases lawyers appear to have taken advantage of the attorney-client relationship for their own personal benefit.[166] Severe problems require stern measures, and a comprehensive ethical rule is an appropriate solution. If a violation is minor (*i.e.*, a token bequest to the drafting attorney or a legacy to an attorney that is no greater than he or she would have received if the client-relative had died intestate), then the disciplinary process itself can take those circumstances into account in determining the appropriate sanction.[167] In such instances, the subject attorney might be given a private or a public reprimand, rather than suspension or disbarment.[168]

3. *The Need for Independent Advice*

An all-inclusive rule would, of course, result in more situations in which an attorney who is to be named as a beneficiary would be required to refer preparation of a testator's will to another lawyer. Because of the provisions of the Code of Professional Responsibility relating to imputed disqualification, an attorney would not be able to assign such a will drafting project to a partner or associate in the same firm.[169] But even aside from these disqualification rules, there would be too great an opportunity for abuse if an attorney to be named as a beneficiary were able to avoid any ethical problems by "referring" preparation of the client's will to another lawyer in

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164. The "appearance of impropriety" is of major concern in a number of the cases that have scrutinized situations where the attorney has prepared a will in which he or she is named as a beneficiary. *See, e.g., In re* Krotenberg, 111 Ariz. 251, 253, 527 P.2d 510, 512 (1974); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 844 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); State v. Collentine, 39 Wis. 2d 325, 331–32, 159 N.W.2d 50, 53 (1968). The appearance of impropriety is virtually impossible to avoid when the attorney-draftsman is named as a beneficiary, even when the draftsman is a close relative. *See supra* text accompanying note 141. The public would benefit from an all-encompassing prohibition, which would give needed protection against unscrupulous attorneys who are willing and able to take advantage of the attorney-client fiduciary relationship for their own benefit. In the long run, the bar would also stand to benefit, because it would avoid the adverse publicity that it receives when one of its members is severely disciplined for his or her unethical conduct in preparing a will that contains a legacy for the draftsman. *See, e.g.*, Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980).

165. *See supra* notes 19–25 and accompanying text (discussing the history of Rule 1.8(c) of the Model Rules of Professional Conduct).

166. *See supra* note 69.

167. *See* ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 6–7.1, commentaries (1979).

168. *Id.* at §§ 6.9–6.10. *See* Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980) (reprimand for conduct subsequent to testator's death); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972) (public reprimand); *In re* Jones, 254 Or. 617, 462 P.2d 680 (1969) (reprimand for failure to insist that client obtain independent legal advice); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981) (public censure); State v. Gulbankian, 54 Wis. 2d 599, 196 N.W.2d 730 (1972) (60 day suspension of lawyer who drew will containing a $10,000 bequest in favor of her sister); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968) (attorney-draftsman admonished for naming himself beneficiary of residuary of estate even though residue was worthless); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963) (reprimand only, because prior law on subject not clearly defined).

169. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1983).

the same office.[170] EC 5-5 speaks in terms of obtaining "disinterested advice" from an "independent, competent person" who is "selected by the client."[171] Although all of these phrases are subject to interpretation, a number of reported decisions provide assistance in determining the kind of conduct that would satisfy the requirement of having a will prepared by independent counsel.

This same issue has arisen in will contest litigation based on undue influence in which the testator's attorney was named as a beneficiary under the will but a second lawyer was retained to review the testamentary instrument and preside over its execution. To the extent that the second attorney provided independent advice and counsel, that fact could rebut the presumption of undue influence that would otherwise apply when an individual who had been acting as the testator's lawyer was named as a beneficiary under the will.[172] For example, in *In re Estate of Komarr*[173] a confused and disoriented sixty-eight-year-old widow who had just been hospitalized wanted a will prepared naming her attorney as a beneficiary to the exclusion of her son. The attorney, a close friend who had previously rendered legal services for the testatrix, was also serving as her conservator.[174] In an obvious effort to avoid questions concerning the propriety of his actions, the attorney-beneficiary contacted a second lawyer, took him to the hospital, introduced him to the testatrix, and waited in the car while the other attorney drafted and presided over the execution of a will that named the first attorney as the sole beneficiary.[175] In spite of the fact that another attorney talked with the testator, drafted the will in question, and supervised the will's execution, the court held that the circumstances were sufficiently "suspicious" to create an inference of undue influence.[176]

In *In re Moore*[177] an attorney was disciplined for conduct that included, *inter alia*, having his secretary draw a will in which the attorney was named as sole beneficiary, notwithstanding the fact that the client reviewed her will prior to execution with another lawyer who shared office space with the first attorney.[178] The court found that these acts were but "feeble, if not insincere, gestures" that clearly fell short of the need for a testator to obtain "independent advice" prior to execution of a will containing this type of a bequest.[179] Thus, whether for purposes of being certain that a testator secures "disinterested advice" as suggested in EC 5-5, or that the client receives "independent advice" in order to rebut a presumption of undue

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170. Problems sometimes arise when the second lawyer, who actually prepared or reviewed the will, was considered not to have offered independent advice and counsel to the testator. *See, e.g., In re* Moore, 218 Or. 403, 410, 345 P.2d 411, 414 (1959); Lyons v. Wilson (*In re* Lobb's Will), 177 Or. 162, 168–69, 187–88, 160 P.2d 295, 297–98, 305 (1945); Komarr v. Beaudry (*In re* Estate of Komarr), 46 Wis. 2d 230, 234, 240–41, 175 N.W.2d 473, 475, 478 (1970).

171. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1983).

172. *See* Morrison v. Linn (*In re* Anderson's Estate), 142 Okla. 197, 286 P. 17 (1929); 3 PAGE ON WILLS, *supra* note 26, at § 29.94. *Cf.* Magee v. State Bar of Cal., 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).

173. 46 Wis. 2d 230, 175 N.W.2d 473 (1970).

174. *Id.* at 234, 175 N.W.2d at 475.

175. *Id.* at 234, 240–41, 175 N.W.2d at 475, 478.

176. *Id.* at 240–41, 175 N.W.2d at 478.

177. 218 Or. 403, 345 P.2d 411 (1959).

178. *Id.* at 410, 345 P.2d at 414.

179. *Id.*

influence, the few cases on point make it clear that an attorney-beneficiary must comply with these requirements both in substance and form to ensure that the provisions of the will were the result of the testator's free and unfettered intent to make the attorney the object of his or her bounty.

III. DESIGNATION OF ATTORNEY-DRAFTSMAN AS EXECUTOR

The practice exists among attorneys in certain areas of the country to name themselves as executors in wills that they draft.[180] This practice appears to be even more common in situations in which the drafting attorney is also named as a beneficiary.[181]

There are a number of reasons why a lawyer engaged in estate planning might have an interest in being designated as an executor in clients' wills. An attorney might be motivated to serve in this capacity to accommodate the client. This could be the case, for example, when the provisions of the will vest considerable discretion in the executor, and for this reason the testator would prefer not to appoint a corporate fiduciary, and feels that friends or relatives would not be appropriate persons to serve in this capacity.[182] Alternatively, the attorney, having rendered legal services to the testator in the past, may have become familiar with the testator's family, assets, or business interests, and therefore might be the logical choice to look after these

180. *See* Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981); State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972); Opinion No. 446, 63 ILL. B.J. 220 (1974); Opinion No. 71, 16 TEX. B.J. 223 (Apr. 1953); C. LYMAN, *supra* note 1, at 113; Martin, *Professional Responsibility and Probate Practices*, 1975 WIS. L. REV. 911, 921–23; *A Bakers' Dozen Topics*, 10 REAL PROP. PROB. & TR. J. 243, 261–62 (1975); *Lawyers Serving as Executors and Trustees*, 7 REAL PROP. PROB. & TR. J. 745 (1972).

However, the practice is apparently not common in other sections of the country. A survey reviewing the provisions of 140 wills filed for probate from July 1, 1982 to October 31, 1982 in Fayette County, Kentucky, and 60 wills filed for probate from October 28, 1981 to October 27, 1982 in Bourbon County, Kentucky showed that of the 140 Fayette County wills, the attorney-draftsman was named as executor in only six instances. On two other occasions the attorney was named as an alternate executor, and in one additional will the executor who was named appeared to be a member of the drafting attorney's family. In the Bourbon County survey, an attorney-draftsman was named as executor on only one occasion, and as alternate executor in four other instances. Survey of Wills in Fayette County, Kentucky and Bourbon County, Kentucky, conducted by Gerald P. Johnston & Christine N. Westover during the fall of 1982 [hereinafter cited as Johnston Survey].

181. *See, e.g.*, Committee on Professional Ethics v. Sylvester, 318 N.W.2d 212 (Iowa 1982); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); Shaffer v. Graham (*In re* Estate of Lawson), 75 A.D.2d 20, 428 N.Y.S.2d 106 (1980); Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976); Nelson v. First Northwestern Trust Co. (*In re* Estate of Nelson), 274 N.W.2d 584 (S.D. 1978); State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

182. Wills that contain marital deduction provisions illustrate situations in which an executor typically will have a significant amount of discretion in the administration of an estate. Thus, for example, the executor generally decides what property is to be designated for funding of the marital share and what is then to be allocated to the non-marital portion. *See generally* 1 F. HOOPS, *supra* note 4, §§ 190–227; H. WEINSTOCK, PLANNING AN ESTATE 49–100 (rev. ed. 1982). Further, if a will is drawn so that Qualified Terminal Interest Property (QTIP) can be utilized to fund the marital deduction, then it is the executor of the estate who must decide whether to make an election to take advantage of these provisions. 26 U.S.C. § 2056(b)(7) (Supp. V 1981); *see* 1 F. HOOPS, *supra*, § 213, at 481–83. For an illustration of when a personal representative was given broad discretionary powers in a non-tax context, see *In re* Estate of Nelson, 232 So. 2d 222 (Fla. Dist. Ct. App. 1970).

matters once the testator has died.[183] In these situations it is possible that the testator was the first one to raise the possibility of the drafting attorney's willingness to serve as executor.[184]

Furthermore, attorneys who draft wills as a part of their practice are particularly interested in providing legal services in connection with the administration of an estate after a testator's death, because they can earn substantial legal fees during probate that more than offset the tendency among practitioners to undercharge for their work in planning estates and preparing the necessary implementing documents.[185] Similarly, an attorney might have an interest in serving as executor since that, too, can be lucrative.[186] An attorney *qua* executor can, in a particular estate, "earn" a fee that is well beyond what that same attorney might receive for the performance of comparable legal services involving the same expenditure of time and effort.[187] Moreover, an executor is entitled to select an attorney to provide necessary legal services to the estate, and in most jurisdictions a lawyer who is named as executor can also act in a legal capacity or retain some other attorney to provide any required assistance in the probate of the estate.[188] In a majority of states the same individual serving in two different capacities—as executor and as attorney for the executor—is entitled to a separate fee for each task.[189] Even in

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183. *See* State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972) (a disciplinary proceeding in which the attorneys effectively argued that they had an unusual relationship with their clients of Armenian ancestry which resulted in their designation as executors and attorneys in the wills that they drafted); Sheppard, *The Lawyer's Ethical Response*, 16 LAW OFF. ECON. & MGMT. 265, 271 (1975); *A Bakers' Dozen Topics*, *supra* note 180, at 261–62; NEB. L. REV. Comment, *supra* note 9, at 457.

184. *See, e.g.*, Opinion No. 367, 60 ILL. B.J. 73 (1971); Opinion E–75–3, 52 WIS. B. BULL. 56 (Supp. June 1979), *reported in* MARU 1980 *supra* note 12, at 589, No. 13057.

185. *See* P. STERN, LAWYERS ON TRIAL 34–38 (1980); Kabaker, *Probate Fees—Where Are We Headed?*, 46 N.Y. ST. B.J. 577 (1974); Sussman, Cates & Smith, *Will Making: An Examination of Client and Lawyer Attitudes*, 23 U. FLA. L. REV. 25, 43–50 (1970).

186. *In re* Estate of Small, 346 F. Supp. 600 (D.D.C. 1972); Wright v. Heron (*In re* Estate of Wright), 132 Ariz. 555, 647 P.2d 1153 (1982); Smith v. Murphy (*In re* Estate of Smith), 131 Ariz. 190, 639 P.2d 380 (1981); *In re* Estate of Margow, 77 N.J. 316, 390 A.2d 591 (1978); Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976). *See generally* Corcoran, *Fees of Legal Representatives and their Attorneys—Six Years After Goldfarb*, 67 ILL. B.J. 618 (1979); *Fiduciary and Probate Counsel Fees in the Wake of* Goldfarb, 13 REAL PROP. PROB. & TR. J. 238 (1978).

187. *In re* Estate of Small, 346 F. Supp. 600, 601 (D.D.C. 1972) ("The [executor's] commission was a guarantee of what could well be lucrative work and what in all probability would be fully compensated work."); *In re* Estate of Margow, 77 N.J. 316, 328, 390 A.2d 591, 597 (1978) ("In most cases, the [executors'] fees which are allowed by statute are generally felt to be very good pay for the work and responsibility. The appointment is, in fact, lucrative. . . . ") (quoting 3 PAGE ON WILLS, *supra* note 26, § 26.55 at 125–26); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976) ($95,000 in executors' fees, most of which were required to be repaid as part of the sanction in a subsequent disciplinary proceeding).

188. E. TOMLINSON, ADMINISTRATION OF DECEDENTS' ESTATES § 20.3–7, at 300 (2d ed. 1978); Martin, *supra* note 180, at 921–23.

189. Although the common law was to the contrary, in most jurisdictions today an executor who is also a lawyer may serve as attorney for the executor and receive separate compensation for each position. *See* Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976); E. TOMLINSON, *supra* note 188, § 20.3–7; Martin, *supra* note 180, at 921–23; *Draft Statement of Principles Regarding Probate Practices and Expenses*, 6 REAL PROP. PROB. & TR. J. 590, 593 (1971). A minority of states, however, still follow the common law rule and deny double compensation in these situations. *See, e.g.*, *In re* Hallenback's Estate, 122 F. Supp. 212 (D.D.C. 1954) (since the executrix could not employ herself as attorney for the estate for additional compensation, she could not employ her law partner); Stearns v. Abbott (*In re* Parker's Estate), 200 Cal. 132, 251 P. 907 (1926) (executor may employ another attorney but not himself; may be able to employ his law firm if he receives none of the profit); 2 A. RUSSELL & J. MERRITT, KENTUCKY PRACTICE 112 (1955).

jurisdictions that do not permit double compensation, an attorney may be able to avoid this barrier by providing in a client's will that the individual designated to serve in the two roles is to be fully and separately compensated for each position.[190]

Although this discussion will focus on situations in which the attorney who has drafted a will is nominated therein as executor, the same considerations apply when an attorney prepares an *inter vivos* or testamentary trust and is named to serve as trustee.[191] An attorney may be willing to be named trustee as an accommodation, or he or she may be primarily interested in the commission that can be earned.[192] Similarly, the suggestion that the drafting attorney also serve as trustee may have come from the settlor, the testator, or the attorney.[193] Hence, although it is considerably more common for attorneys to serve as executors than it is for them to be trustees, virtually the same ethical considerations arise in each situation.[194]

A. *Conflict of Interest and Improper Solicitation*

From an ethical standpoint, the first and foremost question that must be addressed is whether it is improper for an attorney to draft a will in which he or she is designated as an executor. The attorney's conduct is certainly not unethical merely because the appointment may be lucrative. After all, if the lawyer who prepared the will does not serve as executor, someone else will be appointed, and that other person or entity will be entitled to the same commission.[195] Furthermore, an attorney is at least as competent to act in the capacity of executor as most other individuals, and may be as qualified to serve as a corporate fiduciary.[196] Rather, the ethical problems center around questions of improper solicitation and conflicts of interest.

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190. *See* 2 A. RUSSELL & J. MERRITT, *supra* note 189, at 112. In *Panel Discussion: Professional Ethics*, *supra* note 5, ¶ 74.700, at 7–1, 7–31, one of the panel members described a past president of a state bar association "who followed the practice of naming himself as executor, and then providing that he could be compensated both as executor and attorney." *See also* Hartford v. Burfurd (*In re* Estate of Miller), 259 Cal. App. 2d 536, 66 Cal. Rptr. 756 (1968) (court frowns on the attorney's conduct, but permits him to draw a will naming himself as executor and trustee and providing that his law firm should be attorneys for the executor and that separate fees should be paid for services rendered in each capacity).

191. EC 5-6 provides: "A lawyer should not consciously influence a client to name him as executor, *trustee*, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983) (emphasis added). *See also* Zeigler v. Coffin, 219 Ala. 586, 123 So. 22 (1929); Orr v. Love, 225 Ark. 505, 283 S.W.2d 667 (1955); *In re* Estate of Nelson, 232 So. 2d 222 (Fla. Dist. Ct. App. 1970); Zinnser v. Gregory, 77 So. 2d 611 (Fla. 1955); Breadheft v. Cleveland, 184 Ind. 130, 108 N.E. 5 (1915); Estate of Vollbrecht v. Pace, 26 Mich. App. 430, 182 N.W.2d 609 (1970); Shelton v. McHaney, 338 Mo. 749, 92 S.W.2d 173 (1936); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981); Opinion No. 367, 60 ILL. B.J. 73 (1971); Opinion E–75–3, 52 WIS. B. BULL. 56 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 589, No. 13057.

192. *See supra* notes 186–87.

193. *See* Opinion No. 367, 60 ILL. B.J. 73 (1971); Opinion E–75–3, 52 WIS. B. BULL. 56 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 589, No. 13057; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983); H. DRINKER, *supra* note 9, at 94.

194. *See A Bakers' Dozen Topics*, *supra* note 180, at 261–62; *Lawyers Serving As Executors and Trustees*, *supra* note 180, at 745–48.

195. *See, e.g.*, E. TOMLINSON, *supra* note 188, §§ 20.4–1 to .4–8, at 300–06; *Fiduciary and Probate Counsel Fees in the Wake of* Goldfarb, *supra* note 186; *Lawyers Serving As Executors and Trustees*, *supra* note 180, at 748–59.

196. Although some of the services required in the administration of an estate, such as the preparation of inventories and accounts, may be routine and may not require the expertise of a lawyer, legal training can be particularly useful in a number of areas, such as the preparation of estate and inheritance tax returns. Also, certain work involved in the administration of an estate can only be performed by a member of the bar. *See, e.g.*, Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964).

The ethical questions raised when an attorney-draftsman is nominated as executor are not as obvious as those that are presented when the attorney is named as a beneficiary under a will that he or she has drafted. Since the potential ethical improprieties in the attorney-executor context are more subtle, the testator is less likely to detect them.[197] The conflict of interest issue is analogous to that presented in the draftsman-beneficiary situation: did the draftsman take advantage of the attorney-client relationship and obtain a benefit that he or she would not otherwise have received?[198] The benefit, of course, is not as apparent when the attorney must "earn" a commission as it is when the scrivener receives a bequest or devise under a will.[199]

Even more intriguing is the question whether an attorney who has been designated as an executor in a document that he or she has prepared has engaged in improper solicitation of future business. The actual facts in a particular will-drafting situation are often difficult to ascertain since the testator is usually dead by the time the issue is raised and the attorney-draftsman may be the only person who is able to offer evidence concerning what transpired during preparation of the will.[200]

The leading case on in-person solicitation is the decision of the United States Supreme Court in *Ohralik v. Ohio State Bar Association*.[201] The attorney's conduct in that case was particularly invidious since it involved aggressive solicitation of two eighteen-year-old girls shortly after an automobile accident, while one was still in the hospital.[202] Neither of the young women had previously been a client of the attorney, nor were they acquainted with him. Under the circumstances, the Supreme Court had little difficulty holding that the attorney's action was not constitutionally protected and therefore could be regulated by a state bar association.[203] In contrast, the conduct of an attorney in an estate planning setting who succeeds in being named as executor in a will that he or she prepares is far less repugnant since it involves a client who initially retained a lawyer's services to have a will drawn, rather than an attorney who sought out an individual to offer legal services.

In short, it is hard to think of the draftsman-executor problem in the same light as the ambulance-chasing tactics apparent in *Ohralik*. The potential for abuse, however, is just as real, albeit less distasteful. In *Ohralik*, at least, the individuals being solicited were aware of the attorney's intentions—that he was soliciting them to

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197. When an attorney-draftsman "suggests" that he or she might be an appropriate person to designate as executor in a will, it is unlikely that a testator would realize that the draftsman has solicited future business. A testator may, therefore, "agree" to the naming of the scrivener as executor even though the testator has dealt with the attorney only in connection with preparation of the will. *See, e.g.*, Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976). Perhaps because such solicitation is subtle, *Weinstock* is one of the few cases in which action has been taken against an attorney for overreaching in securing designation as executor in a will that the attorney has drawn. However, even *Weinstock* did not involve disciplinary action, but rather the successful opposition to the appointment of the drafting attorney as executor. *See also* Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976). *Walker* arose out of an attorney's conduct in drawing a will naming himself both as a beneficiary and executor. The Supreme Court of Pennsylvania, in addition to suspending the attorney from the practice of law for one year, required him to reimburse the estate for the $62,500 he received in executor's commissions, and $22,000 in attorney's fees.

198. *See supra* text accompanying notes 6–13.

199. *See supra* text accompanying notes 186–90.

200. *See supra* text accompanying notes 17–18.

201. 436 U.S. 447 (1978).

202. *Id.* at 450–53.

203. *Id.* at 456–60.

represent their interests arising out of the automobile accident—although his manner and tactics were clearly excessive.[204] In the will planning context, however, the testator is already a client and is not likely to be aware that the attorney may be soliciting future business by expressing an interest, although indirectly, in being named as executor. In many instances, a testator may have little conception of who an executor is and what such a fiduciary does. Also, the testator may have little or no information on the size of the commissions that can be earned for services rendered in that capacity.[205] It is difficult for an individual to protect his or her own interests from an overzealous attorney when the person being solicited is not even aware of the solicitation. Furthermore, the potential for overreaching may be greater when an attorney-client relationship already exists, with its inherent trust and confidence,[206] than when an attorney, no matter how aggressively, solicits legal business from someone who is a stranger.

Similarly, although the situation involving the draftsman-beneficiary seems more reprehensible, it is not necessarily more serious from an ethical standpoint. Assuming that the testator is fully aware of the surroundings (an assumption admittedly not warranted in a number of the reported cases),[207] then the testator at least knows that he or she is making a testamentary gift to the attorney who prepared the will, even though the suggestion for the transfer may have come from the draftsman.[208] On the other hand, the testator is hardly likely to view the designation of an attorney as executor as bestowing a gratuity on that individual, even though in a large estate the commission may have a comparable effect.[209] And, of course, the financial benefit to the draftsman-executor can be significantly increased if the executor also functions as an attorney and is able to charge a separate fee for the performance of each service.[210]

B. *The Code of Professional Responsibility*

The current Code of Professional Responsibility has several provisions bearing on situations in which an attorney draws a will and is named as an executor therein.

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204. *Id.* at 450–53. In fact, the mother of one of the eighteen-year-old girls called the attorney and tried to repudiate her daughter's oral agreement to retain the attorney's services. *Id.* at 452–53.

205. *See supra* notes 186–87.

206. The Supreme Court of Wisconsin has noted:

> Sometimes the longstanding friendship and confidential relationship between a client and an attorney serves as an effective opportunity in the eyes of others for exerting an undue influence by the attorney upon the testator. Such strength of implication might not arise between an attorney and a client who is relatively a stranger.

State v. Gulbankian, 54 Wis. 2d 599, 603, 196 N.W.2d 730, 732 (1972). *See also* Allen v. Estate of Dutton, 394 So. 2d 132 (Fla. Dist. Ct. App. 1980); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972).

207. *See, e.g.*, *In re* Krotenberg, 111 Ariz. 251, 527 P.2d 510 (1974); *In re* Thompson's Estate, 1 Ariz. App. 18, 398 P.2d 926 (1965); *In re* Kneeland, 233 Or. 241, 377 P.2d 861 (1963); *In re* MacFarlane, 10 Utah 2d 217, 350 P.2d 631 (1960); Komarr v. Beaudry (*In re* Estate of Komarr), 46 Wis. 2d 230, 175 N.W.2d 473 (1970).

208. *Cf. In re* Saladino, 71 Ill. 2d 263, 375 N.E.2d 102 (1978); Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979), *cert. denied*, 446 U.S. 946 (1980); Hubbell v. Houston, 441 P.2d 1010 (Okla. 1967); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

209. *See supra* text accompanying notes 186–90.

210. *See supra* text accompanying notes 188–90.

The first, DR 2-103(A), is directed at improper solicitation, but its terms appear to be applicable in the draftsman-executor context: "A lawyer *shall not* . . . recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer."[211] In contrast to this rather general provision, EC 5-6 is explicitly on point: "A lawyer *should not consciously influence* a client to name him as *executor*, *trustee*, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."[212]

Of course, as is generally the case with Ethical Considerations, the language is permissive, although in the situations specified in EC 5-6, it clearly should be mandatory. Further, while it seems salutary to provide that a lawyer should "avoid even the appearance of impropriety" when a client names the scrivener as executor or trustee, no indication whatever is given concerning how this might be accomplished. In a million dollar estate, even assuming the testator did in fact suggest the attorney's appointment as executor and this designation was logical, the appearance of impropriety may be unavoidable, since the fee to be earned by the attorney-draftsman is likely to be substantial.[213]

The newly adopted Model Rules of Professional Conduct are considerably less specific with regard to the potential impropriety of an attorney preparing a will in which he or she is designated as executor. Although some of the general provisions relating to conflicts of interest and solicitation may be applicable, the Rules contain no language comparable to that found in EC 5-6.[214] In this respect, the Model Rules of Professional Conduct fall far short of the Code of Professional Responsibility, because specific rules provide more effective guidelines for lawyers seeking to act within ethical bounds.[215]

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211. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1983) (emphasis added). It could be argued that DR 2-103(A) does not apply to situations in which the attorney-draftsman has recommended his or her designation as executor in a client's will, because an executor's duties do not encompass the practice of law. *See* Martin, *supra* note 180, at 921 n.45.

212. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983) (emphasis added).

213. In a significant number of jurisdictions, a statutory schedule sets executors' commissions based on a percentage of the value of the estate's assets. *See Fiduciary and Probate Counsel Fees in the Wake of* Goldfarb, *supra* note 186, at 243–45. *See generally* E. TOMLINSON, *supra* note 188, §§ 20.4–1 to 20.6 at 300–06. In North Carolina, for example, the executor's commission on an estate of $1,000,000 could run as high as $50,000 (based on a statutory provision allowing commissions not to exceed 5% on the amount of receipts, including personal property, and expenditures during estate administration). N.C. GEN. STAT. § 28A-23-3 (1976).

214. The notes to Rule 1.8 of the Model Rules of Professional Conduct offer the following explanation:

> EC 5-6 of the Code states that a lawyer should not seek to have himself or a partner or associate named in an instrument as executor of the client's estate. . . . Such an appointment is not expressly prohibited under this Rule, but is subject to the general conflict of interest provision in Rule 1.7 and the more specific requirements of paragraph (a) of this Rule.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8, Legal Background (Proposed Final Draft 1981). *See also id.* Rules 1.7, 1.8(a) & 7.1 to .3.

215. In a similar manner, the Supreme Court of Wisconsin has rendered decisions in several disciplinary proceedings that have served not to sanction the particular lawyer in question but to provide useful guidelines to govern future conduct by members of the bar of that jurisdiction. *See* State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

C. *Ethics Opinions*

A number of ethics opinions have considered the propriety of a testator's naming an attorney-draftsman as executor or attorney for the estate, but most of these add little to what is already reflected in EC 5-6. For example, if the idea that the drafting attorney serve as executor was initiated by the testator and not the scrivener, these opinions express the view that the designation would not be unethical.[216]

However, two ethics opinions are worthy of special note because they tend to fill in some of the void left by EC 5-6. In recognizing that "the draftsman of a will is uniquely situated to secure additional employment for himself,"[217] the Committee on Professional Ethics of the New York State Bar Association has interpreted the phrase "consciously influence" as utilized in EC 5-6 to mean "substantially less psychological pressure than 'undue influence.' "[218] The opinion goes on, nevertheless, to indicate that ethical conduct does not require, in all instances, that the suggestion for the lawyer to serve as executor originate with the testator. According to the committee, in certain situations when, for example, the parties have had a long-term relationship and the lawyer has reason to believe that the client would ask the attorney to serve if the client was aware of the lawyer's willingness to do so, an attorney who drafted the will could be justified in offering his services as executor.[219] This generous interpretation of the provisions of EC 5-6 is counterbalanced by an opinion issued by the Wisconsin Ethics Committee, which determined that although it was not per se unethical under EC 5-6 for a lawyer drafting a will to name himself or herself executor or legal counsel for the estate, the subject attorney should be prepared to furnish "persuasive evidence" that the client-testator formed this intent entirely on his own.[220]

D. *Applicable Court Decisions*

A number of reported court decisions have considered the propriety of an attorney's action in drafting a will in which that same individual is designated as executor. These cases arise in several different contexts. Some are disciplinary proceedings, usually in situations in which the attorney's conduct involved certain other alleged improprieties in addition to being named as executor.[221] Also, virtually the same point can be presented in a proceeding brought by the decedent's beneficiaries in an

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216. Opinion No. 446, 63 ILL. B.J. 220 (1974); Opinion No. 71, 16 TEX. B.J. 223 (Apr. 1953); Memorandum Opinion No. 10–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 614, No. 13193; Informal Opinion 3/31/64, 38 WIS. B. BULL. 52–53 (Supp. Dec. 1965).

217. Opinion No. 481, 50 N.Y. ST. B.J. 356, 356 (1978).

218. *Id.*

219. *Id.* at 357.

220. Memorandum Opinion No. 10–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 614, No. 13193.

221. *See, e.g.*, State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981); State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

effort to prevent the nominated attorney's appointment as executor.[222] Alternatively, a question relating to the propriety of the attorney's conduct during the will drafting process can be raised at the conclusion of estate administration in a challenge to the fees that the attorney *qua* executor has claimed.[223] Finally, the issue can arise out of a claim that the designation of an attorney as executor in a will drawn by the same lawyer results in an inference or presumption of undue influence.[224]

1. *In re* Estate of Weinstock

The decision that is perhaps the most instructive on this ethical issue is the holding of the New York Court of Appeals in *In re Estate of Weinstock*.[225] In *Weinstock* two attorneys (father and son), who had just met the eighty-two-year-old testator, were named as coexecutors in the will they drafted for him.[226] The nomination of the lawyers as executors was subsequently challenged on the testator's death, and the court held, on the basis of EC 5-6, that the testator had not independently and freely designated the attorneys to be his executors.[227] The court concluded that the two were guilty of "impropriety" and "overreaching" that amounted to "constructive fraud" on the decedent, thereby precluding their appointment as executors.[228] The court also noted that, unknown to the testator, the executors each would have been entitled to a full commission under New York law because the estate was valued at over $100,000, notwithstanding that no legitimate purpose was to be served by the designation of multiple executors.[229]

2. State v. Gulbankian

In the leading decision in the area of ethics in estate planning, *State v. Gulbankian*,[230] the Wisconsin Supreme Court discussed possible improprieties in attorneys' conduct with regard to a number of common will drafting practices, including lawyers' drafting wills in which they are named as executors. *Gulbankian* involved a disciplinary proceeding brought against two attorneys, who were brother and sister, for the unethical solicitation of the probate of estates evidenced by their consistent practice of drafting wills in which one or the other was designated as executor or attorney for the estate. Over a seventeen-year period, a total of 44 out of

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222. *See, e.g.*, Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976). *See also In re* Estate of Margow, 77 N.J. 316, 390 A.2d 591 (1978) (testatrix's nephew successfully challenged the appointment of a legal secretary as executrix because she had been engaged in the unauthorized practice of law by preparing the testatrix's will in which she was named).

223. *See, e.g., In re* Estate of Small, 346 F. Supp. 600 (D.D.C. 1972); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976).

224. *See infra* text accompanying notes 260–62.

225. 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976).

226. *Id.* at 4, 351 N.E.2d at 648, 386 N.Y.S.2d at 2.

227. *Id.* at 7, 351 N.E.2d at 649–50, 386 N.Y.S.2d at 3–4.

228. *Id.* at 7, 351 N.E.2d at 650, 386 N.Y.S.2d at 4.

229. *Id.* at 2, 351 N.E.2d at 648, 386 N.Y.S.2d at 2.

230. 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

135 wills that the Gulbankians had drafted contained directions that one or the other Gulbankian, or a sister who was a real estate agent, be appointed executor.[231] In fact, only one will drafted after 1957 failed to name at least one member of the Gulbankian family to some legal or fiduciary position.[232] In an effort to justify their conduct, the Gulbankians, who were of Armenian ancestry, claimed that their clients, who were also Armenians, had all "spontaneously" asked them to serve in various capacities,[233] and they produced several clients at trial who testified that they had initiated the request that the Gulbankians probate their estates.[234]

The Wisconsin Board of Bar Commissioners, seeking to discipline the Gulbankians, argued that an inference of solicitation should be drawn because of the large percentage of wills the two attorneys had drafted that specified their employment in connection with probate of the estates.[235] The court agreed that it would be unethical, either directly or indirectly, to solicit the naming of the draftsman as executor or attorney. Further, the court concluded that it was "fairly rare"[236] for a client to ask a lawyer to serve as executor or attorney for the estate, but that if the client did so request, no improper solicitation would occur. Later in the opinion, the court similarly indicated its belief that the number of times that a client might ask the drafting lawyer, in an unprompted manner, to serve in a fiduciary capacity "will be few and the percentage in total of such wills drawn low."[237] Although obviously concerned about the Gulbankians' conduct, for a number of reasons, including that the case before it was one of first impression, the court held that it would not draw an inference of improper solicitation in the particular circumstances presented.[238]

In a recent decision arising in another jurisdiction, *In re Discipline of Theodosen*,[239] the court publicly censured an attorney whose standard practice, as indicated in over twenty wills he had drafted, was to name himself as executor, coexecutor, or trustee.[240] *Theodosen*, however, involved certain unethical activities above and beyond designation of the attorney as executor or trustee. The disciplinary proceeding in *Theodosen* was an outgrowth of an earlier will contest in which the attorney's conduct in drafting a will in which he was named executor and sole beneficiary was found to constitute undue influence.[241] The attorney's propensity to name himself as executor in numerous wills that he drafted was, therefore, but one factor that led to the disciplinary action taken. Nevertheless, *Gulbankian* and

231. *Id.* at 607, 196 N.W.2d at 734.
232. *Id.* at 608, 196 N.W.2d at 734.
233. *Id.* at 609, 196 N.W.2d at 735.
234. *Id.*
235. *Id.* at 607–08, 196 N.W.2d at 734–35.
236. *Id.* at 610, 196 N.W.2d at 736.
237. *Id.* at 612, 196 N.W.2d at 737.
238. *Id.* at 608–13, 196 N.W.2d at 735–37.
239. 303 N.W.2d 104 (S.D. 1981).
240. *Id.* at 105. This disciplinary proceeding was a direct outgrowth of a will contest in which an attorney, who was the sole beneficiary under a will he drafted, was charged with unduly influencing the testator. *See also* Nelson v. First Northwestern Trust Co. (*In re* Estate of Nelson), 274 N.W.2d 584 (S.D. 1978). The court noted that the lawyer in question had a standard practice of including himself as executor in the wills that he prepared for his clients. *Id.* at 589.
241. Nelson v. First Northwestern Trust Co. (*In re* Estate of Nelson), 274 N.W.2d 584 (S.D. 1978).

Theodosen certainly indicate that an inference can be properly drawn that a lawyer "consciously influenced," as that phrase is used in EC 5-6, [242] his or her clients to name the draftsman as executor, by showing the existence of a substantial number of wills prepared by the same attorney in which such a designation appears. This is a significant therapeutic development because it is unlikely that direct proof will be available to prove that a lawyer initiated the insertion of his or her own name as executor, since the issue is rarely addressed until after the testator's death.[243]

3. Office of Disciplinary Counsel v. Walker

Office of Disciplinary Counsel v. Walker[244] is another significant disciplinary case that evolved from an attorney's conduct during estate planning and in the subsequent administration of the estate. *Walker* illustrates the obvious "benefits" that can accrue to a lawyer who is willing to take advantage of the fiduciary relationship existing between an attorney and an elderly, wealthy client. In *Walker*, the attorney drew a will for his eighty-eight-year-old client, who had an estate in excess of $2,000,000. In addition to being named coexecutor (along with his father), the attorney was a substantial beneficiary under the will.[245] The testatrix died a few months later and, after securing his appointment as coexecutor, the lawyer also named himself attorney for the estate.[246] Upon conclusion of estate administration, a first and final account was filed in which the attorney-executor claimed his one-quarter share of the rest and residue (totaling $239,000), $62,500 as his executor's commission, $32,500 in executor's commissions for his deceased father, and $22,000 in attorney's fees.[247] Other residuary legatees filed exceptions to the accounting, and the attorney-executor agreed to settle the objections by paying an additional $80,000 to the other beneficiaries.[248] Although the account was then approved, the probate court referred the matter to the state's disciplinary board.[249]

A hearing committee designated to review the attorney's conduct expressed particular concern about the serious conflicts of interest that the attorney in *Walker* completely ignored during administration of the estate, and recommended a private censure.[250] The state disciplinary board agreed with the committee's findings, but felt that a public rather than a private censure was appropriate.[251] Upon review, the Supreme Court of Pennsylvania decided to increase the sanction to a one-year suspen-

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242. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983).

243. *See supra* text accompanying note 200. *See also supra* text accompanying notes 17–18.

244. 469 Pa. 432, 366 A.2d 563 (1976).

245. *Id.* at 436, 366 A.2d at 565.

246. *Id.*

247. *Id.* at 437, 366 A.2d at 565.

248. *Id.* The attorney-beneficiary also personally paid $72,500 toward a settlement of $112,500, which he arranged in his capacity as executor with a disinherited nephew who had contested the will. *Id.* The attorney's conduct in negotiating these settlements, involving blatant conflicts of interest in his roles of executor and substantial beneficiary, was severely criticized by the court. *Id.* at 442–44, 366 A.2d at 568–69.

249. *Id.* at 437, 366 A.2d at 565–66.

250. *Id.* at 438, 442, 366 A.2d at 566, 568.

251. *Id.* at 439, 442, 366 A.2d at 566, 568.

sion, and directed that all of the executor's and attorney's fees that the lawyer had collected be returned to the estate. Thus, in addition to the suspension, the attorney was required to refund $84,500 in fees.[252]

The court in *Walker* is to be commended for its innovative handling of this disciplinary matter. Imposition of these sanctions, including, particularly, the court's ordering of a refund of fiduciary fees under its inherent power to control and regulate attorneys' conduct,[253] should go a long way toward convincing lawyers that it is in their own professional and financial best interests to avoid taking personal advantage of the attorney-client relationship in the estate planning setting.

In re Estate of Margow[254] is another imaginative decision demonstrating the capabilities of courts to devise remedies that should help prevent the recurrence of ethical improprieties. The executrix-designate in *Margow* was a former legal secretary who assisted the testatrix in the preparation of a new will. Interestingly, the testatrix wanted to revise her will because the attorney who had drafted it had apparently named himself as executor "without consulting her."[255] After the death of the testatrix, the principal beneficiary under the new will questioned the secretary's right to serve as executrix, and the court upheld the challenge on public policy grounds. Since the former legal secretary had been engaged in the unauthorized practice of law by preparing the decedent's will, the court felt compelled to deny her the fruits of her unlawful act, even though this required it to override the traditional deference given to a testator's choice of executor.[256] According to the court, since the appointment as executrix of the decedent's rather substantial estate would be very "lucrative," barring the secretary from that post seemed to be the only reasonable sanction.[257]

It could be argued, of course, that *Margow* simply demonstrates the judiciary's willingness to impose harsh penalties on nonlawyers when similar conduct by a lawyer would have gone largely unnoticed or unpunished. There is something to be said for this interpretation since the scrivener in *Margow* was not named as a beneficiary in the will that she drafted, and in this respect her conduct was considerably less

252. *Id.* at 442, 366 A.2d at 568.

253. *See id.* at 442 n.7, 366 A.2d at 568 n.7 (the Supreme Court of Pennsylvania's discussion of its authority to regulate attorneys' conduct beyond the sanctions specified for ethical violations). There is no question about the effectiveness of a court's direct regulation of attorneys who practice before it, without reliance on the disciplinary process. In Estate of Karabatian v. Hnot, 17 Mich. App. 541, 170 N.W.2d 166 (1969), the court refused to permit an attorney, who was a beneficiary under a prior will, to contest the validity of the testator's last will, because the attorney had violated public policy in drafting the first will naming himself as a beneficiary. Subsequently, the power to regulate attorneys' conduct as an additional mechanism for the enforcement of the provisions of the code of ethics was praised by Justice Levin of the Michigan Supreme Court:

> One theme runs through the varied factual circumstances and results of these cases: courts do not rely on disciplinary proceedings alone to effectuate the purposes of the Code of Professional Responsibility. They will do what is necessary to undo the results of unethical behavior and thereby protect individuals who may have been harmed by such behavior.

People v. Green, 405 Mich. 273, 310–11, 274 N.W.2d 448, 462–63 (1979) (Levin, J., dissenting) (footnote omitted).

254. 77 N.J. 316, 390 A.2d 591 (1978).

255. *Id.* at 319–21, 390 A.2d at 593.

256. *Id.* at 326–29, 390 A.2d at 596–97.

257. *Id* at 328, 390 A.2d at 597.

reprehensible than that of a number of lawyers in comparable situations.[258] On the other hand, *Margow* serves to illustrate the sort of flexible approach that courts should utilize in developing sanctions that would help preclude similar conduct by others in the future. The Supreme Court of New Jersey should be equally innovative when presented with a case in which an attorney has taken advantage of his or her fiduciary relationship with a testator and has been designated for a "lucrative" appointment as executor in a will that the attorney has drawn.

There is yet another substantial reason why an attorney should be exceedingly cautious about naming himself or herself as an executor or trustee in a document that he or she drafts. When an attorney who has prepared a will is named as a beneficiary, the courts have generally found that this conduct raises a presumption of undue influence.[259] On the other hand, the majority of courts that have addressed the issue have held that the mere fact that the attorney who drafted an instrument is designated as an executor or trustee does not give that individual a significant enough beneficial interest in the estate to result in a presumption of undue influence.[260] However, case law in a number of jurisdictions indicates that an attorney-draftsman who is also named as executor or trustee can be treated as a "beneficiary," thereby raising a presumption of undue influence. This is particularly applicable to situations in which the fiduciary is vested with a substantial amount of discretion over the estate or trust assets.[261] In these jurisdictions, at least, a lawyer who is drafting a will or trust would be well advised not to designate himself or herself as a fiduciary, since this conduct might unnecessarily jeopardize the validity of the entire will or trust.[262]

E. *The Case for an Absolute Prohibition*

All things considered, much can be said from an ethical standpoint for an absolute prohibition of the designation of an attorney-draftsman as executor or trustee. The attorney-client relationship in estate planning can provide a unique opportunity for a lawyer to take advantage of the situation and recommend his or her own appointment as a fiduciary.[263] Many clients will readily accept this suggestion, because they have no inkling that such a designation is anything but routine under the

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258. *See supra* text accompanying notes 35–109 (discussing cases involving attorneys who have drafted wills in which they are included as beneficiaries); *supra* notes 69–70 (describing attorneys' reprehensible conduct in several proceedings).

259. *See supra* text accompanying notes 26–27.

260. *See, e.g.*, Zinnser v. Gregory, 77 So. 2d 611 (Fla. 1955); Breadheft v. Cleveland, 184 Ind. 130, 108 N.E. 5 (1915); Shelton v. McHaney, 338 Mo. 749, 92 S.W.2d 173 (1936).

261. Zeigler v. Coffin, 219 Ala. 586, 123 So. 22 (1929); Orr v. Love, 225 Ark. 505, 283 S.W.2d 667 (1955); Allen v. Estate of Dutton, 394 So. 2d 132 (Fla. Dist. Ct. App. 1980); *In re* Estate of Nelson, 232 So. 2d 222 (Fla. Dist. Ct. App. 1970); Estate of Vollbrecht v. Page, 26 Mich. App. 430, 182 N.W.2d 609 (1970).

262. *See supra* text accompanying note 32 (in some jurisdictions undue influence by a lawyer can jeopardize an entire will and not just the legacy to the attorney-draftsman or his or her appointment as executor or trustee).

263. *See, e.g.*, Hartford v. Burford (*In re* Estate of Miller), 259 Cal. App. 2d 536, 66 Cal. Rptr. 756 (1968); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976); Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976); Nelson v. First Northwestern Trust Co. (*In re* Estate of Nelson), 274 N.W.2d 584 (S.D. 1978); State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

circumstances. Some testators, because of advanced age, poor health, or lack of close family, may be particularly vulnerable to this proposal.[264] Certainly, in the case of a substantial estate, an appointment as executor can be lucrative, and therefore the temptation to overreach may be considerable.[265] Although the great majority of lawyers engaged in estate planning would be unwilling to prepare wills in which they are named as substantial beneficiaries because of the obvious improprieties, these practitioners may have little, if any, of the same reservations about being designated to serve as an executor or trustee, even though the fee that could be earned may be just as financially rewarding.

Little is wrong, of course, with the designation of the scrivener as executor if the idea for this appointment originated with the client. But as was noted in *State v. Gulbankian*,[266] it is unusual for a client to ask an attorney to serve in such a fiduciary capacity, unless the seeds of that "request" were planted by the attorney-draftsman.[267] Unfortunately, questions concerning the propriety of the appointment of an attorney as executor or trustee generally do not arise until after the testator's death, when it is often the attorney's testimony alone that may be the only evidence on this crucial issue.[268]

The current Code of Professional Responsibility is to be commended for its provision in EC 5-6, which warns that a lawyer should not "consciously influence" a client to name him or her as executor or trustee in a will or trust that the attorney drafts. Although not rising to the level of a mandatory Disciplinary Rule, EC 5-6 at least recognizes the existence of an ethical issue in the nomination of a fiduciary, and attempts to provide guidelines to deal with that problem.[269] The new Model Rules of Professional Conduct contain no comparable provisions, and thus, inexcusably, do not expressly preclude this behavior. Although an attorney's action in designating himself or herself as a fiduciary may violate some of the more general ethical rules, such as those pertaining to conflicts of interest,[270] it would have been infinitely better if the new code had expressly forbidden this conduct.

F. *An Alternative Solution*

An all-inclusive ethical prohibition can legitimately be urged to cover draftsman-executors in a manner similar to that recommended when a drafting attorney is named as a beneficiary.[271] This approach recognizes that a client rarely is the

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264. *See, e.g.*, Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979); Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976); Office of Disciplinary Council v. Walker, 469 Pa. 432, 366 A.2d 563 (1976).

265. *In re* Estate of Small, 346 F. Supp. 600 (D.D.C. 1972); Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976); Office of Disciplinary Council v. Walker, 469 Pa. 432, 366 A.2d 563 (1976).

266. 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

267. *Id.* at 612, 196 N.W.2d at 737; Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976). *Cf.* Opinion No. 71, 16 TEX. B.J. 223 (April 1953); Memorandum Opinion No. 10–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 614, No. 13193; Informal Opinion 3/31/64, 38 WIS. B. BULL. 53 (Supp. Dec. 1965).

268. *See supra* text accompanying notes 17–18.

269. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983).

270. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8(a) (1983).

271. *See supra* text accompanying notes 164–68.

one who initiates a request that the attorney-draftsman serve in a fiduciary capacity, and that the truth in these situations is usually impossible to determine after the fact. At the same time, certain situations may occur in which the client may really want the attorney to serve as executor or trustee, and in which the lawyer's designation, rather than that of some other individual or corporate fiduciary, may serve a bona fide purpose.[272] If another attorney were always required to draft an instrument in which a lawyer is designated as a fiduciary, this would discourage this type of appointment, even in those instances when it might be particularly useful.[273] By way of contrast, little reason exists for not deterring the practice of an attorney being named as a beneficiary under a will or trust that he or she has prepared.

As an alternative to an all-inclusive prohibition, a lawyer who has been designated as executor or testamentary trustee in a will that he or she has drawn could be required, after death of the testator, to prove that the decedent did in fact request that the attorney-draftsman act in a fiduciary capacity, and that the scrivener did not improperly influence the testator in this regard. This approach would, at a minimum, serve to cull out situations in which the attorney did not previously know the testator and yet was named as executor in a will that the lawyer drew.[274] In these circumstances, in which little plausible basis for the nomination would exist, the drafting attorney should be precluded from serving in a fiduciary capacity.

This procedure, in which the attorney-draftsman would be called upon to justify the appointment, could be handled by the probate court at the outset of the estate administration process.[275] Although interested parties, like beneficiaries named in the testator's will, should be given an opportunity to be heard on this issue, the court should not rely solely on those having an interest in the estate to oppose the attorney's appointment. After all, beneficiaries named in wills are often not familiar with judicial proceedings and may be hesitant to become involved, even when an attorney-draftsman's designation as executor was in fact improper.[276] Moreover, an attorney's conduct may be subject to question from an ethical standpoint even though private

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272. *See A Bakers' Dozen Topics*, *supra* note 180, at 261–62; Sheppard, *supra* note 183, at 271; NEB. L. REV. Comment, *supra* note 9, at 457.

273. For a discussion of the selection of a personal representative, see S. KESS & B. WESTLIN, CCH ESTATE PLANNING GUIDE INCLUDING FINANCIAL PLANNING ¶¶ 235–36 (1983). An individual's familiarity with the testator's family may cause the testator to designate that person as executor rather than utilize a corporate fiduciary. *Id.* When the testator has no close family, or otherwise feels that his or her relatives would not do a competent job, then his or her lawyer might appear to be a logical choice if the testator already has a preference for an individual to serve as executor.

274. *See, e.g.*, Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976) (two lawyers, who were father and son, had no previous dealings with the testator, but in the process of preparing his will they were named co-executors of his substantial estate); *see also In re* Estate of Margow, 77 N.J. 316, 390 A.2d 591 (1978) (the testatrix sought out a former legal secretary to draft her will, because she was upset that the lawyer who had previously prepared her will had included himself as executor without her approval).

275. In analogous circumstances, a similar procedure appears to be utilized in New York. In that jurisdiction, if an attorney who drew a will is named as a beneficiary he or she is required to file an affidavit with the probate court in order to explain the situation and attempt to justify the legacy. This procedure is described in *Panel Discussion: Professional Ethics*, *supra* note 5, ¶ 74.700, at 7–30, and in Midonick, *supra* note 5, at 219–20.

276. This may explain the dearth of case law in which heirs or beneficiaries have challenged an attorney-draftsman's appointment as executor pursuant to a direction in the testator's will. *See supra* note 222. By contrast, most of the decisions in which an attorney's conduct has been challenged arise in situations in which the attorney-draftsman has also engaged in some other questionable practice, usually when the attorney has named himself or herself as a beneficiary, as well as being designated as executor. *See supra* note 221.

parties decide not to challenge the appointment.[277] An attorney who has acted unethically should not be permitted to enjoy the benefit of his or her impropriety.[278]

The proceeding in which the attorney would be called on to explain his or her fiduciary appointment need not be very extensive, nor unduly delay admission of the will to probate, and could be handled in much the same manner as other routine probate matters.[279] The suggested procedure, of course, would occur during the initial stages of probate, and thus may seem inconsistent with the spirit of the Uniform Probate Code with its emphasis on limited judicial involvement and informal probate administration.[280] Even so, the modest time and expense required to determine the propriety of the appointment seems well worth the effort. Moreover, this procedure would only be applicable to wills in which the attorney-draftsman is designated to serve as executor or trustee, which constitute only a fraction of the wills offered for probate.[281] If the probate court were to determine that the attorney's conduct was sufficiently improper to preclude his or her appointment, then the matter should also be referred to local bar authorities for the investigation of ethical violations.[282] This referral may also be appropriate, depending on the circumstances,

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277. Many disciplinary proceedings arising out of the estate planning context are brought in the aftermath of a will contest in which the attorney-draftsman's conduct has been brought to light. *See supra* note 29. In this respect, private parties have been a major contributing factor, at least indirectly, to the initiation of disciplinary proceedings. An extreme example of the point that a disciplinary proceeding can be initiated without being founded on the objections of clients or former clients is *In re* Gonyo, 73 Wis. 2d 624, 245 N.W.2d 893 (1976). In *Gonyo* an attorney was charged with, *inter alia*, drafting a will in which he was named as the residuary legatee. In spite of the numerous, serious charges he faced, none of his clients registered any complaint about his conduct. *Id.* at 628, 245 N.W.2d at 894–95. Nevertheless, the attorney was suspended from practice for six months. *Id.* at 628–29, 245 N.W.2d at 895.

278. This has been highlighted in several will drafting cases. *See, e.g.*, Estate of Karabatian v. Hnot, 17 Mich. App. 541, 170 N.W.2d 166 (1969) (court refuses to allow an attorney-beneficiary under a prior will to contest the validity of the last will because his conduct in preparing a will in which he was named as a beneficiary so violated the code of ethics that it was against public policy); *In re* Estate of Margow, 77 N.J. 316, 390 A.2d 591 (1978) (nonlawyer precluded from receiving a lucrative appointment as executrix because she had engaged in the unauthorized practice of law by her assistance in the preparation of the will); Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976) (attorneys precluded from being appointed to profitable positions as executors of decendent's estate because of improprieties committed in drafting testator's will and in securing their designation as executors); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976) (in addition to a one year suspension, court requires attorney to return all fees, totalling $84,500, received as a consequence of serving as executor and attorney for the estate).

279. These would include matters like filing the will, determining the place of domicile, notifying the heirs-at-law and next-of-kin, appointing an executor or administrator, and posting a bond. *See generally* E. TOMLINSON, *supra* note 188, §§ 5.1–5.11.

280. *See* UNIF. PROB. CODE §§ 3–301 to 3–311, 8 U.L.A. 245–56 (1983). For a detailed discussion of the trend toward reduced court supervision over decedents' estates, see Wellman, *Recent Developments in the Struggle For Probate Reform*, 79 MICH. L. REV. 501 (1981).

281. Unfortunately, there are no figures documenting the percentage of the total wills that are probated in which the attorney who drafted the instrument is named as executor. In some communities, this practice may be common, and the percentage of wills containing such designations may be higher than one would expect. See State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972), which apparently reflects the practices in Racine, Wisconsin. However, a limited survey of recent wills admitted to probate in Fayette and Bourbon Counties, Kentucky, indicates that in these two communities, at least, the practice of a drafting attorney naming himself or herself as executor is not common. *See* Johnston Survey, *supra* note 180. Because corporate fiduciaries are often named and because when an individual executor is desired, the testator may well have a spouse or other close family member in mind, it seems likely, when the practices of all communities across the country are taken into consideration, that designations of the drafting attorney as executor would appear in less than 10% of the wills filed for probate.

282. Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 437, 366 A.2d 563, 565–66 (1976) provides a good example of a situation in which the probate court, after approving a first and final account, was sufficiently concerned about the attorney's conduct that it referred the matter to the state's disciplinary board for review.

even in situations in which the probate court does not think the improprieties were serious enough to prevent the lawyer's appointment as a fiduciary.[283]

This proposed approach, based on an ethical rule similar in content to the provisions of EC 5-6 and on procedures for enforcement at the outset of probate administration, may dissuade attorneys who draft wills from allowing themselves to be nominated as executors or trustees, particularly in circumstances in which the appointment might be difficult to justify. If the suggested ethical measures have these consequences, then they will have served their purpose well.

IV. The Scrivener Named as Attorney in the Testator's Will

Although it is not unusual for practitioners engaged in estate planning to be designated as executors,[284] it is even more common for the draftsman to be named as attorney for the estate of a testator whose will is being prepared.[285] The extent of this custom varies, but considerable evidence indicates that the practice is extensive in certain areas of the country.[286] Thus, it is not surprising to find that many form books

283. In *In re* Estate of Margow, 77 N.J. 316, 390 A.2d 591 (1978), the Supreme Court of New Jersey upheld the lower court's refusal to appoint a woman as executrix because she had engaged in the unauthorized practice of law by helping to prepare the will in which she was designated. The court seemed considerably more concerned with the unauthorized practice of law than it was with the question of a draftsman naming herself as executrix, and it was, of course, inappropriate to forward the case to a disciplinary committee since the person involved was not a lawyer. But had the draftsman been an attorney, then, from the court's tone, it appears that the appointment of the scrivener as executor would have been approved, in spite of the ethical problems, because of "the traditional deference given to testator's choice of executor . . . ." *Id.* at 326, 390 A.2d at 596. Even if a court would rule in favor of appointment of an attorney-draftsman as executor, it should refer the matter of the lawyer's conduct to the appropriate bar authorities for investigation and review. In Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976), the court should have referred the matter to the disciplinary authorities for consideration of ethical violations, even though the court imposed its own sanction by precluding the attorneys in question from serving as executors. It is possible, of course, that the matter was in fact referred in the suggested manner, but no mention of it was made by the court, and no subsequently reported case indicates that any disciplinary action was taken against the particular attorneys.

284. *See supra* text accompanying notes 180–81.

285. *See, e.g.*, Highfield v. Bozio, 188 Cal. 727, 207 P. 242 (1922); *In re* Estate of Ogier, 101 Cal. 381, 35 P. 900 (1894); Allen v. Estate of Dutton, 394 So. 2d 132 (Fla. Dist. Ct. App. 1980); Hawaiian Trust Co. v. Hogan, 1 Hawaii App. 560, 623 P.2d 450 (1981); Haines v. George (*In re* George's Estate), 11 Ill. App. 2d 359, 137 N.E.2d 555 (1956); *In re* Estate of Giacomini, 4 Kan. App. 2d 126, 603 P.2d 218 (1979); Succession of Martin, 56 So. 2d 176 (La. Ct. App. 1952); *In re* Caldwell, 188 N.Y. 115, 80 N.E. 663 (1907); State v. Duerksen (*In re* Heitholt's Estate), 202 Okla. 351, 213 P.2d 865 (1950); Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 170 P.2d 748 (1946); Pickett's Will, 49 Or. 127, 89 P. 377 (1907); State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972); Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 128 N.W.2d 443 (1964); Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 80 N.W.2d 759 (1957); 2 F. Hoops, *supra* note 4, § 336, at 68; H. Tweed & W. Parsons, Lifetime and Testamentary Estate Planning 86 (7th ed. 1966).

286. *See, e.g.*, State v. Gulbankian, 54 Wis. 2d 605, 607, 196 N.W.2d 733, 734 (1972). In *Gulbankian*, 94% of the wills the Gulbankians drafted after 1956 contained instructions to the executor to employ one or the other as attorney. As a part of their defense in the disciplinary proceeding brought against the brother and sister, the Gulbankians argued that it was the custom in Racine County, Wisconsin for lawyers who draft wills to include a provision for their appointment as attorneys to assist in probate, and they presented evidence based on wills prepared by seven other law firms in the community, in which a similar practice was extensively followed. *Id.* at 610, 196 N.W.2d at 735–36. In fact, the percentage of wills drafted by the various firms that contained such provisions ranged from a low of 22.6% to a high of 70.8%. *Id.* at 610 n.1, 196 N.W.2d at 736 n.1.

contain clauses for the designation of the scrivener, or the scrivener's law firm, to serve as attorney for the estate,[287] or, more precisely, as attorney for the executor.[288]

As in the case of an appointment as executor, a lawyer who is retained to assist in the probate of an estate is often able to earn a substantial fee.[289] To a large extent, this is attributable to the fact that the law in a number of jurisdictions still enables attorneys to charge for their services on the basis of a percentage of the value of the estate being administered,[290] which may bear little relationship to the difficulty of the work or the time required to perform the services.[291] Thus, lawyers doing probate work are often able to earn fees that substantially exceed the amount that they could charge for other comparable legal work.[292] Because it can be so lucrative, attorneys engaged in estate planning are obviously interested in being retained to provide legal services during probate administration. In fact, probating estates tends to be sufficiently profitable that practitioners have a tendency to undercharge their clients for will preparation and related estate planning services, in the hope that the testator's representatives will subsequently employ the drafting attorney to assist in probate of the testator's estate.[293]

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287. *See, e.g.*, 20 AM. JUR. LEGAL FORMS 2D § 266:123 (1974); E. BELSHEIM, MODERN LEGAL FORMS § 9763 (1968); FIRST KENTUCKY TRUST CO., WILLS AND TRUST MANUAL XVI-53 (1964); 2 KENTUCKY LEGAL FORMS §§ 1317.01–.02 (1978 rev.).

288. The accurate terminology is "attorney for the executor." As the Supreme Court of California explained in an early decision: "There is no such office or position known to the law as 'Attorney of an Estate' . . . . [H]e acts as the attorney of the executor, and not of the estate . . . . " *In re* Estate of Ogier, 101 Cal. 381, 385, 35 P. 900, 901 (1894). This distinction is apparently made because the executor is personally liable for the conduct of any attorney that is retained, *See, e.g., In re* Caldwell, 188 N.Y. 115, 80 N.E. 663 (1907); Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 80 N.W.2d 759 (1957). This seems needlessly technical, at least for purposes of the present discussion, since the executor certainly represents the estate and its interests, and if the attorney represents the executor, that cannot be very different from the attorney acting on behalf of the estate. Furthermore, even if the executor were liable for the acts of the attorney, he presumably would be entitled to reimbursement from the estate unless, of course, the executor had been negligent in making the selection in the first place. Perhaps because of some skepticism on the author's part about the precise terminology in this particular instance, the phrase "attorney for the estate" is sometimes utilized in this article and is intended to mean the same thing as the more awkward, but perhaps more precise term "attorney for the executor."

289. *See, e.g.*, P. STERN, *supra* note 185, at 34–38; Kabaker, *supra* note 185, at 577–86.

290. For a recent effort to justify the percentage approach for determination of attorneys' fees for administration of estates, see Bank of America v. Koslow (*In re* Estate of Effron), 117 Cal. App. 3d 915, 924–28, 173 Cal. Rptr. 93, 98–100, *appeal dismissed*, 454 U.S. 1070 (1981). There has been, however, considerable support for reforming the percentage formula for compensation of attorneys' estate work. *See* Eubank, *The Future for Estate Lawyers*, 10 REAL PROP. PROB. & TR. J. 223, 223 (1975); *Statement of Principles Regarding Probate Practices and Expenses*, 8 REAL PROP. PROB. & TR. J. 293, 294–95 (1973). *See also* Wright v. Heron (*In re* Estate of Wright), 132 Ariz. 555, 647 P.2d 1153 (1982); Colorado State Bd. of Agriculture v. First Nat'l Bank (*In re* Estate of Painter), 39 Colo. App. 506, 567 P.2d 820 (1977) (describing the change in that jurisdiction from a percentage of the estate formula to a "reasonableness" standard for determining attorneys' fees). In spite of this trend, in many jurisdictions attorneys' fees for probate work are still primarily based on a percentage of the value of the estate, although this approach can be based on informal custom in localities in which no statutory percentage is applicable. *See generally Fiduciary and Probate Counsel Fees In the Wake of* Goldfarb, *supra* note 186.

291. *See supra* text accompanying notes 186–90 (discussing the similar issue of attorney compensation for services as a personal representative). This was dramatically illustrated in an editorial appearing in the Washington Post that dealt with attorneys' fees for probate work in the state of Maryland. In that jurisdiction, attorneys can charge 10% of the first $20,000 of an estate, and 4% of the remainder. In one instance cited by the Post, an attorney in Maryland, employing the percentage formula, "earned" a fee of $5,724 for handling an estate valued at $113,103, even though only 3 hours of legal work were required, which resulted in an hourly rate of $1,908. Washington Post, March 9, 1981, at A12, col. 1. This, of course, represents an extreme example of the benefits of a formula approach.

292. *See supra* note 291.

293. See Sussman, Cates & Smith, *supra* note 185, at 48, 50, in which the authors discuss the prevailing attitude among a number of estate planning attorneys that low-cost wills are used to provide a means of earning substantial income in lawyers' later years through the administration of the estates of clients whose wills they drafted. *Id.*

EC 5-6 addresses the problem of attorney designation by providing that "[a] lawyer should not consciously influence a client to name him as . . . lawyer" in a will that is being prepared.[294] The difficulty, again, is the virtual impossibility of determining whether the draftsman or the client first suggested appointment of an attorney and, if the draftsman did so, whether that necessarily constitutes improper influence in the particular circumstances.[295] As in the case of designation of the drafting attorney as executor, the ethical issues generally do not surface until after the testator's death, when the will becomes effective, and it may therefore be difficult to contradict the attorney's contention that it was the testator who suggested that the will designate the draftsman to provide legal services to the estate.[296]

A. *Ethical Issues Raised by Attorney Designation*

Substantial ethical problems are raised by the designation of the draftsman as attorney for the estate, since it appears unlikely that a testator would know about the role of an attorney in the probate of an estate, much less think it desirable to include a specific appointment at the time the will is drafted. It is therefore questionable whether a client, on his or her own initiative, would request the lawyer preparing the will to insert a provision specifying that the drafting attorney or that attorney's firm be retained after the testator's death.[297] In this respect, the problem is different from the designation of an executor, since testators may be more familiar with the executor's position, may associate it with the administration of estates, and may possibly even have some concept of the duties involved in such an appointment.[298]

The insertion into a will of a provision that designates a particular attorney raises a number of serious questions, including the possibility of an improper conflict of interest. A lawyer in the process of drafting a will has an obligation to furnish

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294. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983).

295. These are continuing problems with regard to ethical questions in the estate planning context since they virtually always arise after the client-testator's death. *See supra* text accompanying notes 17–18.

296. The evidence presented in Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 80 N.W.2d 759 (1957), provides an excellent illustration of this point. In *Braasch* the testatrix's will included a specific provision that the executor nominated therein should retain the attorney-draftsman to assist in probating the will. *Id.* at 569–70, 80 N.W.2d at 759. The attorney testified that another client of his had brought the testatrix to his office, and that the first draft of her will named an executor but contained no mention of the retention of an attorney. The client, who was deceased at the time of the litigation, supposedly read the draft and expressed concern that the attorney-draftsman's name was not included, since she wanted to be sure that he would be in charge of the probate of her estate. The attorney further testified that he then modified the will as the testatrix had requested. Interestingly, after this will-drafting session, the attorney never saw the testatrix again. *Id.* at 570, 80 N.W.2d at 759–60. In spite of the incredulity of the testimony, no one could refute the attorney's statements once the testatrix had died.

297. *See supra* note 296 (discussing Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 80 N.W.2d 759 (1957)).

298. Banks undoubtedly have done their share to make the general public aware of what is involved in the administration of an estate and of the duties of an executor appointed for this purpose through their marketing effort to persuade people to utilize their fiduciary services. *See, e.g.*, Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964) (describing the extensive advertising by banks of their estate administration services). *See also* 122 TRUSTS & ESTATES, March 1983 at 37 (advertisement of estate services offered by Trust Department of the Atlantic Bank of New York). Many financial institutions display a number of brochures that provide free information on such matters as the appointment of an executor and the probate of an estate. Generally, no comparable widespread source of information is readily available to the public about the separate role of attorneys in the administration of a decedent's estate, although such material may be distributed in a limited fashion through the efforts of state and local bar associations.

independent legal advice to the testator,[299] and that duty would clearly conflict with any effort on the draftsman's part to promote his or her own self-interest by securing an appointment as attorney to provide legal services to the estate.[300] It is important that some individual or entity be designated as executor,[301] but in the vast majority of situations it serves no legitimate purpose to name an attorney in a will.[302] Yet, the practice is fairly common, and the ethical issues loom particularly large when the attorney's own interests are juxtaposed with the responsibility to render independent counsel to a client.[303] Self-interest is a strong motivating factor, and the conflicts of interest involved in this situation are both real and substantial.

The conduct of practitioners designating themselves as attorneys in wills they prepare also raises serious questions of improper solicitation. In many instances the draftsman may have simply inserted the subject language into the will, along with certain standard provisions like the executor's administrative powers, without specifically discussing this designation with the testator.[304] The testator arguably "approved" of this provision, because he or she read, or at least had the opportunity to read, the entire will prior to execution.[305] To the extent that the testator did not agree with the attorney designation, in theory, he or she should have objected. The failure to protest is arguably tantamount to approval.

More realistically, wills contain a great deal of language that most testators do not fully understand, and simply accept on faith. This is certainly true of many of the

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299. "Attorneys must not allow their private interests to conflict with those of their clients. . . . They owe their entire devotion to the interests of their clients." United States v. Anonymous, 215 F. Supp. 111, 113 (E.D. Tenn. 1963) (citiations omitted).

300. *Cf.* State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957) (disciplinary proceedings against an attorney who, *inter alia*, prepared a will naming himself a principal beneficiary and executor). The court expressed grave concern about the attorney's dealings with the other beneficiaries in his capacity as executor because it was apparent from his conduct that "he was more concerned in making secure his rights under the will than he was of performing his duty as an attorney." *Id.* at 101, 84 N.W.2d at 149.

301. *See generally* 2 F. HOOPS, *supra* note 4, §§ 336–38; E. TOMLINSON, *supra* note 188, §§ 1.1–.9. This is not to say, of course, that administration of an estate will fail if a will does not name an executor, since the probate court, at the initiation of the administration process, will appoint an executor, technically known as an administrator *cum testamento annexo* or "c.t.a." *Id.* §§ 1.4–2. But the position of executor is sufficiently important that the testator should always designate some person or entity in the will, rather than leave that determination to the court.

302. First, the designation of an attorney in a will is generally not binding, and the executor remains free to employ any attorney that the executor may choose. *See infra* note 310 and accompanying text. Moreover, since the attorney retained to assist in probate must work closely with the executor, it makes considerable sense to let the executor employ the attorney, rather than to allow the testator to bind the executor to his or her own personal choice. Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 428–30, 170 P.2d 748, 752 (1946); Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 170, 128 N.W.2d 443, 445–46 (1964); P. ASHLEY, YOU AND YOUR WILL 88 (1977). If the testator feels strongly about the selection of a particular lawyer to provide services to his or her estate, then it perhaps would be advisable to name that person as executor of the estate. *See* Miller, *supra* note 9, at 439.

303. The problems involved in this ethical issue are best highlighted in the Wisconsin Supreme Court's landmark decision in State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972). *See infra* text accompanying notes 322–30.

304. *See, e.g.*, State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972); ABA Comm. on Professional Ethics and Grievances, Informal Dec. 602 (1963); Opinion 171 (Tex.), *reprinted in* 18 BAYLOR L. REV. 270 (1966); Opinion 152 (Tex.), *reprinted in* 18 BAYLOR L. REV. 259–60 (1966); Opinion 580, (Oct. 16, 1941), OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATIONS OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION 327 (1956). *Cf. In re* Estate of Margow, 77 N.J. 316, 390 A.2d 591 (1978) (designation of attorney-draftsman as executor without testatrix's consent); *In re* Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981) (discussion of attorney's standard practice of designating himself as executor).

305. *See* ABA Comm. on Professional Ethics and Grievances, Informal Dec. 602 (1963); Opinion 171 (Tex.), *reprinted in* 18 BAYLOR L. REV. 270 (1966).

standard executor or trustee powers, such as the authority to retain and invest in securities and other property without regard to the limitations that may otherwise be applicable to fiduciary investments.[306] Similarly, a testator may not understand the legal consequences of provisions relating to the waiver of a fiduciary's bond or the full implications of a simultaneous death clause.[307] Likewise, a testator may simply accept a clause that designates an attorney to assist in probate in the belief that such a provision is normally included as part of any will. In this respect, the testator does not understand that the lawyer who drafted the will has, in reality, engaged in solicitation of legal business, and thus the testator is unable to protect his or her own interests. The insertion of a clause appointing the drafting attorney as executor may not put the testator on notice that the draftsman is seeking future business,[308] and the designation of an attorney to provide legal services to the estate is even less likely to be detected as solicitation, because the testators generally do not understand the meaning of such a legal position or that an appointment in advance is hardly necessary or desirable in the way that the selection of an executor is.[309] Thus, solicitation in this context presents a serious ethical problem.

B. *Attorney Designation—Not Binding on Personal Representative*

A provision in a will to the effect that a particular attorney or law firm should be retained by the executor could be misleading. It is settled law in all but one or two jurisdictions that such a provision, even when its terms appear to be mandatory, is not binding on the executor.[310] The courts have consistently reasoned that an attorney who is to provide legal services to the estate is the executor's lawyer, and not a representative of the testator, the estate, or the estate's beneficiaries. Accordingly, the executor should be free to employ an attorney of his or her choice.[311] Yet, in most instances the language the draftsman has utilized to name himself or herself as attorney to assist in probate administration seems to be more than a mere

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306. For an example of standard "boilerplate" language utilized in wills for this purpose, see 2 F. HOOPS, *supra* note 4, § 338 at 81–82. If such a provision is automatically incorporated in every will by reason of a statutory provision such as the Fiduciaries Powers Act, then the drafting attorney may be relieved from explaining the force and effect of this terminology. But if it is to be written into the will, then the attorney should make a reasonable effort to explain it to the client, even though that may meet with only limited success, since a testator should understand, to the extent possible, all of the terms and provisions in a will before it is executed.

307. *Id.* §§ 331, 336 at 69.

308. *See supra* text accompanying notes 200–10.

309. *See supra* text accompanying notes 297–302.

310. *See* Highfield v. Bozio, 188 Cal. 727, 207 P. 242 (1922); *In re* Estate of Ogier, 101 Cal. 381, 35 P. 900 (1894); Hawaiian Trust Co. v. Hogan, 1 Hawaii App. 560, 623 P.2d 450 (1981); *In re* Caldwell, 188 N.Y. 115, 80 N.E. 663 (1907); Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 170 P.2d 748 (1946); Pickett's Will, 49 Or. 127, 89 P. 377 (1907); Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 128 N.W.2d 443 (1964); 2 F. HOOPS, *supra* note 4, § 336 at 68; H. TWEED & W. PARSONS, *supra* note 285, at 86; Scott, *Testamentary Directions to Employ*, 41 HARV. L. REV. 709 (1928). In Louisiana, on the other hand, this type of will provision is binding and the executor is required to employ the attorney that the testator has selected. Succession of Stovall, 193 So. 2d 368 (La. Ct. App. 1966); Succession of Martin, 56 So. 2d 176 (La. Ct. App. 1952).

311. *See, e.g.*, *In re* Estate of Ogier, 101 Cal. 381, 384–85, 35 P. 900, 901 (1894); *In re* Caldwell, 188 N.Y. 115, 121, 80 N.E. 663, 664 (1907); Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 428–30, 170 P.2d 748, 752 (1946); Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 571, 80 N.W.2d 759, 760 (1957).

suggestion.[312] The designation of a lawyer usually appears in terms comparable to those used to nominate an executor, even though the latter appointment is generally binding, barring proof that the individual or institution is incompetent to serve in that capacity.[313]

In many instances, the executor-designate and members of the testator's family are likely to be misled into believing that they should retain the services of the attorney named in the will, without considering that the provision might not be legally binding.[314] Even if the executor-designate knows or has reason to suspect that the provision may not be enforceable, it is still likely that the specified attorney will be retained, since the executor and members of the testator's family generally want to carry out the desires of the decedent.[315] This, too, can be deceptive when the testator had no preference in the matter, and simply acceded to the provision inserted by the drafting attorney in the belief that it was routine boilerplate.[316]

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312. *See, e.g.*, Highfield v. Bozio, 188 Cal. 727, 727, 207 P. 242, 242 (1922); *In re* Estate of Ogier, 101 Cal. 381, 383, 35 P. 900, 901 (1894); Haines v. George (*In re* George's Estate), 11 Ill. App. 2d 359, 360, 137 N.E.2d 555, 556 (1956); *In re* Caldwell, 188 N.Y. 115, 121, 80 N.E. 663, 664 (1907); Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 423–25, 170 P.2d 748, 750 (1946); Pickett's Will, 49 Or. 127, 137–38, 89 P. 377, 380 (1907); Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 167, 128 N.W.2d 443, 444 (1964). The language of the will in *In re* Estate of Ogier, 101 Cal. 381, 35 P. 900 (1894), is typical of the terms that are employed by the draftsman regarding employment of himself or herself as attorney to assist in the probate of the testator's estate; "I hereby select as the attorney of my estate John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate, and the requirements of this my last will." *Id.* at 383, 35 P. at 901.

313. *See, e.g.*, T. ATKINSON, *supra* note 139, at 604–05. *But see In re* Estate of Margow, 77 N.J. 316, 390 A.2d 591 (1978) (court refuses to appoint the person designated in the decedent's will as executrix because she had engaged in the unauthorized practice of law in assisting the testatrix in the preparation of her will).

314. One of the principal reasons the executor-designate and members of the testator's family are misled is that the wills themselves generally do not suggest that the executor utilize the services of a particular attorney, but rather are written in mandatory terms. For language used in actual wills designating attorneys, see *supra* note 312. Yet, considerable authority suggests that such a clause in a will should specifically provide that it is merely advisory and is not legally binding on the executor. *See* Ethics Opinion 76–6, 58 CHICAGO B. REC. 169 (November–December 1976), *reported in* MARU 1980, *supra* note 12, at 180, No. 11022; Opinion 628 (N.Y. County June 13, 1974), *reported in* MARU 1975, *supra* note 12, at 369, No. 9219. The Illinois Ethics Committee recognized the problem with language almost uniformly used in wills to designate an attorney to assist in the administration of an estate:

> The Committee . . . is of the opinion that the use of directory or mandatory language concerning the employment of a particular attorney to settle the estate is improper. Such language not only may mislead the testator but *may also mislead the executor as to his authority to employ an attorney of his own choice.* Such mandatory language also raises an appearance of impropriety. The Committee, however, does approve of precatory language requesting or suggesting that the executor employ a particular attorney.

Opinion No. 446, 63 ILL. B.J. 220 (1974) (emphasis added).

Not only is it difficult, if not impossible, to find clauses in actual wills that designate attorneys for the estate in terms that are not binding, it is hard even to find a form whose terms are appropriate for this purpose. One such form provides:

> Designation Of Attorney
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> Having been advised of my legal inability to bind my executors in the selection of an attorney to represent my estate, I suggest, without imposing any obligation upon them, that my executors retain_____, Esq., as attorney for my estate and the trusts created under my will, because of his familiarity with my financial affairs and my family, and because of the confidence in him I have developed during the many years in which he has represented me.

2 F. HOOPS, *supra* note 4, § 336, at 69.

315. The mere fact that a particular attorney prepared the decedent's will, without more, gives the draftsman a distinct advantage when it comes to the selection of a lawyer to assist in the probate process. When a clause is inserted in a will suggesting or recommending the retention of the draftsman, that virtually assures employment of that particular attorney. P. ASHLEY, *supra* note 302, at 88; J. BARNES, *supra* note 1, at 8.

316. *See supra* text accompanying notes 304–09.

C. *A Dearth of Case Law*

In spite of the serious nature of the improprieties raised by the conduct of attorney-draftsmen in preparing wills that name themselves to positions as attorneys for the executor, very few cases have focused on the ethical aspects of this common estate planning practice. Perhaps the lack of case law is not as unusual as it first may appear, because once the problem has been uncovered by an interested party, it can usually be remedied without the kind of litigation that often serves to highlight attorney improprieties. Thus, for example, many of the disciplinary cases involving an attorney who was named as a beneficiary in a will that he or she drafted are brought in the aftermath of will contest litigation in which the attorney's conduct was directly in issue.[317] By contrast, once a decision has been made to question the appointment of an attorney under a will, the executor is likely to discover that the designation is not binding, thereby permitting the executor to select another lawyer.[318] If the attorney who was named has commenced to provide legal services to the estate before the executor learns that the appointment in the will was not legally enforceable, the executor can still discharge that attorney and replace him or her with another lawyer of the executor's own choosing.[319] In either case, the executor usually will not have to resort to a court proceeding to achieve the desired results.[320] Thus, the drafting attorney's conduct in designating himself or herself as attorney in a will is generally not subject to the type of close adversarial scrutiny that often leads to disciplinary action.

Moreover, because attorney designations are not considered legally binding, disciplinary authorities have undoubtedly treated the matter less seriously than they might otherwise.[321] This is unfortunate, for the real question is not whether such a provision is enforceable, but rather whether the attorney has engaged in improper

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317. *See supra* note 29.

318. *See supra* note 310.

319. *See, e.g.*, Hawaiian Trust Co. v. Hogan, 1 Hawaii App. 560, 623 P.2d 450 (1981); Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 170 P.2d 748 (1946).

320. As the cases cited *supra* note 310 indicate, a number of court decisions have addressed this issue. But the law now appears to be clear that such a provision is not binding on the executor except in one or two states. Virtually every jurisdiction has reported decisions directly on point. Accordingly, innumerable instances undoubtedly have occurred in which an executor, once informed of his or her legal rights, has been able to select an attorney of the executor's own choosing, without formal opposition from the attorney named in the will.

321. If the person or entity named as executor is advised of the state of the law and prefers not to retain the services of the attorney designated in the testator's will, then the personal representative has the necessary means to correct the situation by employing his or her own counsel. Thus, in a sense, any overreaching that occurred when the will was drafted can be remedied if the executor is aware that a clause in a will appointing an attorney is not legally binding. *Cf.* Magee v. State Bar of Cal., 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962). In *Magee* the attorney in question had previously been found guilty of undue influence as a result of his conduct in drafting a will in which he was the principal beneficiary and the will had been set aside on that ground. The court dismissed the subsequent disciplinary proceeding and explained its position, in part, by indicating that the attorney had already been punished for his actions:

> As the instant case suggests . . . attorneys take a grave risk in drawing wills in which they receive more than a modest gift that is in keeping with the nature of the relationship they have with the client. Petitioner took this risk, unwisely, and one consequence was that he lost the substantial gift in Mrs. Rohde's will when it was contested.

Id. at 433, 374 P.2d at 813, 24 Cal. Rptr. at 846. *See also* Ruckes v. Magee (*In re* Rohde's Estate), 158 Cal. App. 2d 19, 323 P.2d 490 (1958).

solicitation resulting in the executor and other interested parties feeling obligated to proceed in accordance with the terms of the provision, even though they might have made other arrangements had they thought that they were free to do so.

1. State v. Gulbankian

In *State v. Gulbankian*,[322] the Wisconsin Supreme Court specifically focused on the ethical improprieties involved when an attorney-draftsman consistently prepares wills that include provisions for his or her employment. The court's decision is unparalleled in this regard, although several other cases have discussed and, at least by inference, criticized the same conduct.[323]

In *Gulbankian*, a brother and sister who were engaged in the practice of law prepared well over one hundred wills in which one or the other, or a sister who was a real estate agent, were designated as executor or attorney for the estate. In fact, ninety-four percent of the wills they prepared after 1956 contained a clause instructing the executor to retain either G.K. Gulbankian or Vartak Gulbankian as attorney.[324] The court expressed grave concern over this practice, stating that it was extremely doubtful that a client would request inclusion of this provision in a will, and indicating that an inference of solicitation might be appropriate in subsequent cases.[325] As part of their defense to the disciplinary charges, the Gulbankians claimed that it was the custom in their county for lawyers to name themselves as attorneys in wills that they draw, and introduced evidence indicating that from twenty-three to seventy-one percent of the wills drafted by seven other firms practicing in the same county contained similar provisions.[326] Although this evidence clearly demonstrated the pervasiveness of the custom, at least in Racine County, Wisconsin, the court sagaciously observed that "the extensiveness of a practice does not mean the practice is legitimate if in fact the practice amounts to solicitation of business."[327]

Because it was the first disciplinary case to raise this issue, the court felt constrained not to judge the attorneys harshly.[328] Instead of disciplining the Gulbankians, the court used the case as an opportunity to provide guidelines for the proscription of similar conduct in the future.[329] According to the court, a lawyer

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322. 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

323. Hartford v. Burford (*In re* Estate of Miller), 259 Cal. App. 2d 536, 66 Cal. Rptr. 756 (1968); Shelton v. McHaney, 338 Mo. 749, 92 S.W.2d 173 (1936) (attorney designated as executor and trustee); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976) (attorney who drew will naming himself as a beneficiary thereunder and who also served as executor and attorney, required to refund his substantial executor's and attorney's fees); Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 80 N.W.2d 759 (1957). *See also* ABA Comm. on Professional Ethics and Grievances, Informal Dec. 602 (1963); Informal Opinion 008 (N.D. May 14, 1974), *reported in* MARU 1975, *supra* note 12, at 430, No. 9672; Opinion 171 (Tex. Mar. 1958), *reprinted in* 18 BAYLOR L. REV. 270 (1966); Opinion 152 (Tex. June 1957), *reprinted in* 18 BAYLOR L. REV. 259–60 (1966); Memorandum Opinion 10–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 614, No. 13193.

324. State v. Gulbankian, 54 Wis. 2d 605, 607, 196 N.W.2d 733, 734 (1972).

325. *Id.* at 612, 196 N.W.2d at 736–37.

326. *Id.* at 610 n.1, 196 N.W.2d at 736 n.1.

327. *Id.* at 610, 196 N.W.2d at 736.

328. *Id.* at 612–13, 196 N.W.2d at 737.

329. *Id.*

would not be guilty of unethical behavior if the provision for employment of the draftsman as attorney was the result of the unprompted intent of the client, but indicated that these instances are likely to be few and far between, and that the consistent recurrence of such a designation in wills would constitute improper conduct for which an attorney could be disciplined.[330]

2. *In re* Estate of Devroy

A recent decision of the Supreme Court of Wisconsin, *In re Estate of Devroy*,[331] is of interest because of its conclusion that if a will specifically conditions the executor's appointment on the employment of a given lawyer to assist in probate of the estate, the executor-designate must retain the services of that particular lawyer. Although Wisconsin law is strongly weighted in favor of carrying out a testator's intent, prior cases had uniformly held that a clause in a will providing that a specified lawyer be retained was not binding on an individual executor who refused to employ that attorney.[332] In *Devroy*, however, the testator's will designated a particular person to serve as executor "on condition that" he retain a named lawyer to provide legal services to the estate, and that if for any reason the executor was unwilling to do so, then an alternate executor would be nominated.[333] After the testator's death, the executor-designate, who did not want to retain the attorney who was named in the will, sought a declaratory judgment in order to determine his rights. The trial court decided that the clause in the will which, in effect, required the executor to employ a specific attorney or forfeit his appointment, was against public policy and therefore invalid, even though there was no evidence of unethical conduct on the attorney's part.[334] On appeal, the Wisconsin Supreme Court reversed, holding that public policy did not require a testator to put his executor's preference above his own with regard to selection of an attorney to render legal services in connection with probate of the testator's estate.[335] According to the court, "[a] testator may very well conclude that selection of the attorney is more important to him than who serves as the personal representative."[336]

Portions of the decision in *Devroy* seem inconsistent in spirit with the court's earlier pronouncements in *State v. Gulbankian*.[337] *Gulbankian* had indicated that it was unusual for a testator to specify an attorney in a will without the idea having originated with the scrivener, and that such an attorney designation might well be the product of improper solicitation.[338] The *Devroy* court, while purporting to follow its

330. *Id.* at 612, 196 N.W.2d at 736–37.
331. 109 Wis. 2d 154, 325 N.W.2d 345 (1982).
332. *See, e.g.*, Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 128 N.W.2d 443 (1964); Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 80 N.W.2d 759 (1957).
333. 109 Wis. 2d 154, 155, 325 N.W.2d 345, 345–46 (1982).
334. *Id.* at 156–57, 325 N.W.2d at 346.
335. *Id.* at 160–62, 325 N.W.2d at 348–49.
336. *Id.* at 160, 325 N.W.2d at 348.
337. 54 Wis. 2d 605, 196 N.W.2d 733 (1972).
338. *Id.* at 612, 196 N.W.2d at 736–37.

ruling in *Gulbankian*, actually manifested some fundamental disagreement with its prior decision. For example, although the court in *Devroy* conceded that a direction in a will might arouse suspicion that the attorney had improperly solicited the business, the court reasoned that this suspicion "will often be unfounded."[339] Further, the court distinguished *Devroy* from *Gulbankian* on the grounds that the record before it disclosed that this was the only will the lawyer in question had ever drafted that contained such a provision. Therefore, the court held that, under the circumstances, the attorney-draftsman had avoided "even the appearance of solicitation."[340]

While *Gulbankian* made it clear that it was not holding that a lawyer could never draft a will that contained a provision that the executor was to employ the draftsman as attorney,[341] this is entirely different from the determination in *Devroy* that a testator can, if the right terminology is used, not only specify that a particular attorney is to be retained, but, in effect, make the designation binding on the executor. Thus, if a lawyer is in a position to take advantage of the close attorney-client relationship that often exists in an estate planning setting, the drafting attorney may, according to *Devroy*, secure his or her appointment whether the executor agrees or not.[342] Although it may seem unlikely that a lawyer would go to such extremes in an effort to secure future legal business, that possibility seems all too real in view of the significant number of reported cases involving the preparation of wills that include substantial bequests to the drafting attorney.[343]

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339. 109 Wis. 2d 154, 160, 325 N.W.2d 345, 348 (1982).

340. *Id.* at 161, 325 N.W.2d at 348. The appearance of solicitation, like the appearance of impropriety, seems to relate to whether certain conduct appeared to constitute solicitation in the eyes of the public, not other members of the bar. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983). Thus, it is hard to understand the *Devroy* court's rationale, since the public would hardly be aware that the will was the only one that the lawyer in question had ever drawn containing such a provision.

341. 54 Wis. 2d 605, 610–11, 196 N.W.2d 733, 736 (1972). The ethics opinions that have been issued by the Wisconsin Bar clearly confirm the interpretation of *Gulbankian* that it is not unethical for a lawyer to draft a will in which he or she is named as attorney for the executor, if the preference is the result of the unsolicited desire of the testator. Opinion E–75–3, 52 WIS. B. BULL. 56 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 589, No. 13057; Memorandum Opinion 10–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 614, No. 13193.

342. In fairness to the Wisconsin Supreme Court's holding in *Devroy*, the seeds for that decision were clearly sown some 18 years before, in the decision in Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 128 N.W.2d 443 (1964). In *Sieben*, the will appointed the testator's son as executor, and went on to provide "I hereby request and direct that the executor . . . shall employ the services of [the attorney who drew the will for purposes of probating the estate]." *Id.* at 167, 128 N.W.2d at 444. The executor was unwilling to do so, and the attorney brought an action to compel his appointment. The court held that the executor would not be required to employ the designated attorney, but in the process the court clarified its position on this issue:

> This holding controls the instant situation where the testator names the executor and the attorney the executor is to employ, but does not indicate any preference between the two. In the absence of a statement of intent in the will that a named attorney be employed by the personal representative even at the cost of the resignation of the personal representative, an executor is not required to employ an attorney in opposition to the executor's own wishes.

Id. at 170, 128 N.W.2d at 445.

343. The numerous reported decisions in which an attorney-draftsman has prepared a will naming himself or herself as a substantial beneficiary provide excellent case studies of situations in which an estate planner may have taken advantage of the attorney-client relationship for his or her own benefit. *See supra* note 11; *supra* note 69 (discussing Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979) and Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976)). If an attorney were in a position to include himself or herself as a beneficiary even though that might not reflect the true wishes of the testator, then the insertion of a clause like that which appeared in *Devroy* would be even easier to accomplish, assuming that the attorney-draftsman wanted to insert the clause and that the testator could be taken advantage of.

D. *Applicable Ethics Opinions*

In contrast to the dearth of case law, a number of ethics opinions have considered the propriety of a draftsman's inclusion of a provision in a will specifying that he or she be retained as attorney. Most of these opinions simply confirm the provisions of EC 5-6 to the effect that it is unethical to include such a clause in a will if the attorney improperly influenced the testator to insert the language.[344] Other ethics opinions, however, add appreciably to the limited scope of the code provisions and case law.

For example, several ethics opinions approve of the insertion of a clause designating a lawyer to provide legal services if the testator specifically requested the drafting attorney to represent the estate and if that intention was not prompted by the draftsman.[345] One of the opinions further states that the terms of such a provision should not be mandatory, but may suggest or request the drafter's employment, so long as that provision is accompanied by specific language indicating that the executor is not legally bound by that provision.[346] In another opinion, the Wisconsin Ethics Committee, under the controlling authority of *State v. Gulbankian*, determined that it was not per se unethical for an attorney to prepare a will in which he or she was designated as legal counsel if that was the "unprompted desire" of the testator, but the attorney who drew the document would be expected to furnish "persuasive evidence" that this intention was formed entirely on the testator's own initiative.[347]

A 1974 ethics opinion of the New York County Lawyers' Association[348] provides an interesting contrast to the holding in *In re Estate of Devroy*.[349] The New York County Ethics Committee acknowledged that a will could contain precatory language stating that the testator wanted the executor, who also happened to be the principal beneficiary, to retain the lawyer who drafted the will to represent the estate if the provision were inserted at the initiative of the testator.[350] However, the draftsman would be obligated to advise the testator that the clause was not enforceable, since the executor could ignore the request and employ his or her own attorney. Further, the committee determined that it would be unethical "for the attorney to use an *in terrorem* clause associated with the request to the effect that the beneficiary

344. *See, e.g.*, Opinion No. 60 (1926–27), OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF N.Y. AND THE N.Y. COUNTY LAWYERS' ASSOCIATION 26 (1956); Opinion No. 580 (Oct. 15, 1941), *Id.* at 327; Memorandum Opinion 10–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 614, No. 13193.

345. Ethics Opinion 120 (July, 1948), *reprinted in* 38 MICH. ST. B.J., May, 1959 at 154; Opinion 71, 16 TEX. B.J. 223 (April 1953); Ethics Opinion 23 (Wash. May 1953), *reported in* O. MARU & R. CLOUGH, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 498, No. 4541 (1970) [hereinafter cited as MARU & CLOUGH]; Informal Opinion 3/31/1964, 38 WIS. B. BULL. 52 (Supp. Dec. 1965); Opinion 76–6, 58 CHICAGO B. REC. 169 (Nov.–Dec. 1976), *reported in* MARU 1980, *supra* note 12, at 180, No. 11022; Opinion 628 (N.Y. County June 13, 1974), *reported in* MARU 1975, *supra* note 12, at 369, No. 9219.

346. Opinion 76–6, 58 CHICAGO B. REC. 169 (Nov.–Dec. 1976), *reported in* MARU 1980, *supra* note 12, at 180 No. 11022.

347. Memorandum Opinion 10–76, 52 WIS. B. BULL. 91 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 614, No. 13193.

348. Opinion 628 (N.Y. County June 13, 1974), *reported in* MARU 1975, *supra* note 12, at 369, No. 9219.

349. 109 Wis. 2d 154, 325 N.W.2d 345 (1982).

350. Opinion 628 (N.Y. County June 13, 1974), *reported in* MARU 1975, *supra* note 12, at 369, No. 9219.

would forfeit his interest in the estate if he failed to comply with the above condition."[351] Little difference exists between a provision that would require a beneficiary to forfeit his or her share of an estate unless that individual, *qua* executor, retained a specific attorney to assist in probating an estate, and a clause as in *Devroy* that would require an executor to employ a particular lawyer or forfeit the executorship.

In the most far-reaching opinion on this point, the Ethics Committee of the North Dakota State Bar Association determined that a lawyer should not be permitted, under any circumstances, to draw a will that provides for his or her own appointment as the estate's attorney.[352] This conclusion was reached on the basis that such a designation is unenforceable since it is the executor's choice and not the testator's, and since inclusion of such a provision in a will strongly indicates that the drafting attorney did not properly advise the testator-client.[353] This approach has much to commend it because it recognizes certain basic realities, provides for an all-inclusive prohibition that is not tied to particular circumstances which are difficult if not impossible to prove, and thus avoids the uncertainties of a case-by-case approach.

E. *Proposed Prohibition of Attorney Designation Clauses*

Upon consideration of the various aspects of the problem, including, particularly, the unlikelihood that a testator would suggest inclusion of a provision in his or her will regarding employment of the draftsman as attorney[354] and the fact that this type of a clause is not binding on the executor under the law in virtually all jurisdictions,[355] preparation of a will containing such a provision should be considered unethical and subject to disciplinary sanctions.

EC 5-6 of the current Code of Professional Responsibility at least recognizes the potential unethical nature of such conduct, but the prohibition against a lawyer's consciously influencing a testator to name that attorney in a will that he or she is drafting places too much emphasis on the testator's intent, which is difficult if not impossible to determine after death.[356] Nevertheless, EC 5-6 is vastly superior to the new Model Rules of Professional Conduct, which presumably rely on broad concepts relating to solicitation and conflicts of interest to govern such activity, rather than specific provisions covering this common practice.[357] It is unfortunate that the Model Rules, even in their earlier unexpurgated versions, did not deal directly with this problem.[358] Nonetheless, such attorney conduct constitutes improper solicitation and

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351. *Id.*

352. Informal Opinion 008 (N.D. May 14, 1974), *reported in* MARU 1975, *supra* note 12, at 430, No. 9672.

353. *Id.*

354. *See supra* text accompanying notes 297–98.

355. *See supra* note 310.

356. *See supra* text accompanying notes 17–18 & 295–96.

357. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c), Legal Background (Proposed Final Draft 1981).

358. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (Proposed Final Draft 1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (Discussion Draft 1980).

involves an inherent conflict of interest, and hence can and should be regulated by disciplinary authorities even without the benefit of a specific rule.[359]

An all-inclusive prohibition would have the distinct advantage of putting attorneys specifically on notice that such conduct will result in the imposition of disciplinary sanctions. Before recommending the adoption of this ethical restriction, however, the factors in favor of a blanket rule should be balanced against the benefits that might be achieved by allowing inclusion of such clauses in wills. The general public seems to gain little if lawyers are permitted to insert provisions in wills regarding retention of the draftsman, since the advantages of such clauses can generally be achieved by alternatives that do not raise nearly as serious ethical questions. For example, if a testator merely wants the executor to know of the testator's preference that a specific lawyer be employed in connection with probate, a handwritten letter to the executor-designate, left with the original of the will, would serve this purpose, and yet would be less likely to give the misleading impression that the choice was legally enforceable against the executor.[360]

In those unusual situations in which the attorney designation is important to the testator, better methods exist for achieving the desired result. Since it is a rare occurrence, it might not be unduly restrictive to require that a testator use another lawyer to draw any will that includes a provision to the effect that the executor-designate is to retain the services of a particular attorney to probate the estate. Referral under these circumstances would ensure the benefits of independent advice,[361] by serving as a buffer to be certain that the original attorney's self-interest

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359. The Court of Appeals for the Eighth Circuit spoke to an analogous point in Randall v. Reynoldson (*In re* Randall), 640 F.2d 898 (8th Cir. 1981), when it disbarred an attorney for his conduct in preparing a will naming himself as sole beneficiary of a multi-million dollar estate:

> Furthermore, it appears that the prohibition contained in EC 5-5, prohibiting the drafting of a will by an attorney making himself a beneficiary, is but the current articulation of a long-standing prohibition against that practice. Obviously such a situation is fraught with a high potential for overreaching and abuse. The prohibition in EC 5-5 is also only a restatement of old Canon 9, *Canons of the American Bar Association*. [Citations omitted].

Id. at 905. *See also* Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 843 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979) ("[I]t is obvious the canons cannot contain enough 'thou shalt nots' to identify every ethical temptation a lawyer will encounter in his or her practice."); Columbus Bar Ass'n v. Ramey, 32 Ohio St. 2d 91, 98–100, 290 N.E.2d 831, 835–36 (1972); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 440 n.5, 366 A.2d 563, 567 n.5 (1976).

At least one court has taken a more conservative approach, however, and refused to apply the more general provisions of the Canons of Professional Ethics to a will drawn prior to the effective date of the Code of Professional Responsibility, even though the will in question violated the provisions of EC 5-5 and 5-6. Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 440–41 (N.D. 1980).

360. *See* Sheppard, *supra* note 183, at 271–72 (recommending use of a separate and informal writing addressed to the executor named in the will); *Panel Discussion: Professional Ethics*, *supra* note 5, ¶ 74.700, at 7–32 to –33 (discussion of advantages of a letter over a provision in a will, but commenting that such letters are rarely used in New York City). *Cf.* Memorandum Opinion 6–77, 52 WIS. B. BULL. 93 (Supp. June 1979), *reported in* MARU 1980, *supra* note 12, at 617, No. 13209 (explaining the advantages of a written statement separate from the will to convey the testator's intent in an analogous situation).

361. An example of commendable behavior on an attorney's part appears in Shelton v. McHaney, 338 Mo. 749, 92 S.W.2d 173 (1936). In *Shelton*, a lawyer who drafted a will and was designated as executor and trustee thereunder was charged with undue influence. The court, which held in favor of the attorney, commented with approval on his conduct, which it described in the following terms:

> [The attorney] said that he then told testator that inasmuch as he was to be named as trustee he thought it would be best for testator to employ some one else to write the will in order to avoid any possible contention of undue influence. It appears from [the attorney's] testimony that testator at first dismissed as ridiculous the thought that

would not have an improper effect on the terms of the testator's will. Alternatively, if the testator honestly believes that it is essential that a specific lawyer be designated, then rather than attempting to impose that choice on the executor, even to the extent of conditioning the executor's appointment on employment of a particular attorney as demonstrated in *In re Estate of Devroy*,[362] it would be preferable to name the individual attorney to the executor's post.[363] In such circumstances, the propriety of the designation of the scrivener as executor would, of course, have to comply with any restrictions on such an appointment, including, particularly, a determination that the choice of executor was independently arrived at by the testator.[364]

Effective imposition of a comprehensive prohibition against such attorney designations will require considerable cooperation to ensure compliance with such an ethical standard. Unlike some of the other estate planning practices in which the lawyer's questionable conduct is often brought to the attention of the disciplinary authorities as a consequence of private litigation focusing on the same issue,[365] the designation in a will of an attorney for purposes of probate is generally not binding on an executor; hence it is not usually necessary to file suit in order for an executor to reject the testator's "choice" in favor of another attorney.[366] Enforcement of this ethical prohibition, however, can be achieved if those court officials involved in estate administration would refer any matters relating to the conduct of attorney-draftsmen in designating themselves as attorneys in wills filed for probate to the appropriate disciplinary authorities for review.[367]

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anyone might raise the question of undue influence on that ground, but that at [the attorney's] continued insistence that either some other lawyer should write the will, or at least be employed to check and go over it with testator, the latter consented to have some other lawyer check it and go over it with him, which was done.

Id. at 758, 92 S.W.2d at 176. By way of analogy, in the case of legacies to an attorney, the Code of Professional Responsibility recommends that the testator obtain "disinterested advice from an independent, competent person," and that the lawyer who is to be named as a beneficiary should "insist" that the client have the will "prepared by another lawyer selected by the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1983). *See also supra* text accompanying notes 169–79 (discussing the need for independent counsel in the attorney-beneficiary context).

362. 109 Wis. 2d 154, 325 N.W.2d 345 (1982).

363. *See* Miller, *supra* note 9, at 439. The problem with the *Devroy* approach is that although it may succeed in having a particular attorney named to provide legal services to the estate, the executor will then be required to work closely with the specified attorney, which may not be advantageous to the estate if a personality conflict develops. P. ASHLEY, *supra* note 302, at 88. On the other hand, any potential personality problems would be eliminated if the attorney is named as executor. He or she could then provide legal services to the estate, or retain someone else to provide these services.

364. *See supra* text accompanying notes 266–83.

365. *See supra* text accompanying note 29 (citing numerous cases in which disciplinary action followed on the heels of a successful will contest challenging an attorney's conduct in preparing a will naming himself or herself as a substantial beneficiary).

366. *See supra* text accompanying notes 318–20.

367. An excellent example of how this sort of referral might work appears in Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976). In *Walker* the attorney filed a first and final account in which he claimed substantial fees for serving as attorney and as executor, and the account also reflected a distribution to himself of $239,000 under the terms of the testator's will. Other legatees filed exceptions, but the attorney was able to settle their objections by making additional payments to the complaining parties. Since the exceptions were then withdrawn, the probate court approved the accounting, but the court then referred the question of the propriety of the attorney's conduct directly to the state's disciplinary board. *Id.* at 437–38, 366 A.2d at 565–66.

V. THE CORPORATE FIDUCIARY'S "POLICY" OF NAMING THE DRAFTSMAN AS ATTORNEY FOR THE ESTATE

It is a widespread practice among corporate fiduciaries to retain the services of the lawyer who drafted a will or trust in which a bank is named as executor or trustee to perform any legal work that may be necessary in estate or trust administration.[368] In probating a testator's estate, legal services are virtually always needed because of the strict application of laws relating to unauthorized practice of law, which preclude corporate fiduciaries from handling matters processed through the probate court system.[369] The policy of retaining the draftsman to provide legal services has been described as a "gentlemen's agreement" between financial institutions and the bar,[370] as "reciprocal back scratching,"[371] as a "symbiotic relationship,"[372] and, less generously, as a "conspiracy" between corporate executors and lawyers to exploit the client by recommending that the testator name a bank as executor in exchange for assurance that the executor, once appointed, will retain the attorney to assist in the probate of the testator's estate.[373]

A. *Statement of Principles*

The "policy" of retaining the draftsman to provide legal services is part of a broader attempt to define the role and responsibility of lawyers, on the one hand, and other professionals on the other, with regard to the provision of estate planning services.[374] One consequence of this overall effort is a "Statement of General Policies" adopted in 1941 by the Trust Division of the American Banker's Association and the American Bar Association that allocates various aspects of estate planning and estate and trust administration to trust institutions and members of the bar.[375] For example, the Statement prohibits banks from drawing wills or other legal documents, but provides that trust institutions can advertise their estate planning services to the

368. *See* Bank of America v. Koslow (*In re* Estate of Effron), 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981); Hood v. Lawrence Nat'l Bank (*In re* Estate of Harper), 202 Kan. 150, 446 P.2d 738 (1968); *In re* Rielly, 310 S.W.2d 524 (Ky. 1957); P. ASHLEY, *supra* note 302, at 88; Hyrne, *Unauthorized Practice in Estate Planning and Administration: A Mild and Temperate Dissent*, 29 U. FLA. L. REV. 647, 671 (1977); *Panel Discussion: Professional Ethics*, *supra* note 5, ¶ 74.700, at 7–33; *Role and Function of the Estate Lawyer*, *supra* note 5, at 238; NEB. L. REV. Comment, *supra* note 9, at 457–58.

369. *See, e.g.*, Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. 48, 273 S.W.2d 408 (1954); People *ex rel.* Comm. on Grievances v. Denver Clearing House Banks, 99 Colo. 50, 59 P.2d 468 (1936); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964); Green v. Huntington Nat'l Bank, 4 Ohio St. 2d 78, 212 N.E.2d 585 (1965).

370. NEB. L. REV. Comment, *supra* note 9, at 457.

371. Bank of America v. Koslow (*In re* Estate of Effron), 117 Cal. App. 3d 915, 919, 173 Cal. Rptr. 93, 95, *appeal dismissed*, 454 U.S. 1070 (1981).

372. Sussman, Cates & Smith, *supra* note 185, at 46.

373. NEB. L. REV. Comment, *supra* note 9, at 458.

374. *See* Berle, *Estate Planning: Whose Sacred Domain?* 9 INST. ON EST. PLAN. ¶¶ 1800 & 1807 (1975); Hyrne, *supra* note 368, at 670–71; Pedrick, *supra* note 145, ¶ 71.1902.

375. 7 MARTINDALE-HUBBEL LAW DIRECTORY 72M (1978). *See also supra* note 374 (citing articles providing a detailed discussion of the various Statements of Principles that lawyers have entered into with other professional groups with regard to the provision of estate planning services).

general public.[376] Significantly, the Statement further stipulates that "[i]n the employment of counsel, the trust institution should endeavor, in the absence of compelling reasons to the contrary, to engage the attorney who drew the instrument, or who represented the testator or donor, to perform any legal work required in the course of trust or estate administration."[377]

Similar "agreements" regarding bank policy in favor of employing the attorney who drew the testator's will have been adopted by local bar organizations and banking groups, thus making this practice prevalent throughout the country.[378] However, in response to the threat of governmental legal action based on the alleged anticompetitive effect of these agreements, the joint statements have been largely disavowed in the past few years.[379] This is not to say that thirty or forty years of an established business practice have also been abandoned, but only that the written statements acknowledging that these practices exist have been withdrawn.[380]

B. *A Well-Entrenched "Policy"*

A number of decisions have indicated that the "policy" endorsed by the 1941 Statement of Principles is pervasive and well established.[381] For example, in *In re Rielly*[382] a state bar association charged a lawyer with improper solicitation of business from one of the executors named in a will that the attorney had prepared.[383] The will in question designated a bank and the testator's secretary as coexecutors and also named the latter as a principal beneficiary. After the testator's death, the attorney called the bank and was assured "that the bank had a long standing custom, whenever it was named as an executor, of employing as attorney the lawyer who had drawn the will, and that the bank desired and intended to employ [the attorney in question]."[384]

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376. Statement of General Policies, Banks with Trust Functions, 7 MARTINDALE-HUBBEL LAW DIRECTORY 72M (1978).

377. *Id.* at 73M.

378. The Statement of General Policies issued in 1941 by the National Conference Group, representing the Trust Division of the American Bankers Association and the American Bar Association, urged local organizations to adopt similar policy positions:

> The National Conference Group hereby recommends to state and local bar and trust organizations the creation of joint conference committees, composed equally of representatives of the trust institutions and the bar associations, for the purpose of implementing and making effective the carrying out of these principles and the amicable and cooperative solution of disputes or misunderstandings in relation thereto.

Id. For examples of this type of local implementation, see People *ex rel.* Comm. on Grievances v. Denver Clearing House Banks, 99 Colo. 50, 52–53, 59 P.2d 468, 469 (1936) (referring to similar agreement between Denver banks and the Denver bar); NEB. L. REV. Comment, *supra* note 9, at 457 (quoting at length from a written agreement entered into between the Hennepin County, Minnesota, Bar Association and the Minneapolis banks).

379. *See* Podgers, *Statements of Principles—Are They On the Way Out?*, 66 A.B.A.J. 129, 129–31 (1980). *See also* Hyrne, *supra* note 368, at 669–73.

380. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the U.S. Supreme Court overturned a bar association minimum fee schedule because it violated antitrust laws. Yet, in spite of predictions to the contrary, little has occurred in the manner of determining fees for legal services rendered during probate. *See Fiduciary and Probate Counsel Fees in the Wake of* Goldfarb, *supra* note 186, at 238–42. The resistance to change is likely to be even greater in the cooperative agreements between trust institutions and practicing attorneys, which seem to have been highly beneficial for both groups.

381. *See supra* note 368.

382. 310 S.W.2d 524 (Ky. 1975).

383. *Id.* at 524. Actually, the attorney's father, who was also a lawyer, had drawn the testator's will, but after the father's death, the younger attorney drew several codicils for the testator. *Id.*

384. *Id.*

The individual coexecutor, however, wanted to employ another lawyer because of her belief that the testator did not want the draftsman to serve as attorney for the estate. Because of the intransigency of the two executors, a meeting was scheduled between the various parties. During that meeting, the bank's president indicated "that the bank had never varied from its policy of employing the attorney who had drawn the will."[385] The parties finally agreed to a compromise whereby the attorney who drew the will and a lawyer selected by the individual coexecutor would serve jointly and split the fee.[386] In the aftermath, however, disciplinary proceedings were brought against the attorney-draftsman for his conduct in improperly soliciting the individual coexecutor, and he was reprimanded for his efforts to secure her agreement to his employment as attorney for the estate.[387]

The uniform policy of employing the drafting attorney to assist in probate would be less objectionable if such action were in fact in furtherance of the testator's intent. Although this may be the case if a will is silent on the matter,[388] it is unlikely, considering that even when a will specifically contains an attorney designation, the testator may not have intended it.[389] Certainly, the mere preparation of a person's will does not give the scrivener a vested interest in the subsequent probate of that individual's estate.[390] Yet, a general policy that mandates employment of the drafting attorney, no matter how much sense that may make from a purely business standpoint, is tantamont to vesting the draftsman with such a right.

C. *Conflict in the Corporate Fiduciary's Obligations*

From the standpoint of the trust institution, a number of interesting questions are raised as a consequence of the pervasive practice of naming the lawyer who prepared the will as attorney to assist in administration of the testator's estate. Because of its fiduciary position, a corporate executor has a duty to carry out the testator's intent and to act in the best interests of the estate and the various beneficiaries.[391] While

385. *Id.* at 525.

386. *Id.* As it turned out, the two attorneys apparently worked well together, and shared the fee, which amounted to two percent of the decedent's estate. *Id.*

387. *Id.* at 526. One interesting aspect of the case is that the attorney in question, William J. Rielly, practiced "almost exclusively" in Cincinnati, although he was also admitted in Kentucky. *Id.* at 525. Thus, without regard to any personality differences that may have existed between the individual coexecutor and the attorney, there did seem to be some valid basis for not retaining the lawyer who drafted the will in this case. Rielly attempted to overcome this problem by retaining a lawyer from Covington, Kentucky, who would assist him in the probating of the estate in Kentucky. *Id.* The other unusual facet of *In re* Rielly is that the individual coexecutor had previously brought a similar solicitation charge against Rielly with the Cincinnati Bar Association, which exonerated Rielly of any improprieties. *Id.*

388. H. TWEED & W. PARSONS, *supra* note 285, at 86; NEB. L. REV. Comment, *supra* note 9, at 457. *Contra In re* Rielly, 310 S.W.2d 524, 525 (Ky. 1975) (coexecutor, who was testator's secretary, believed that testator did not want the lawyer who drew his will to serve as attorney for his estate); Hyrne, *supra* note 368, at 671.

389. *See, e.g.*, State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972); Thayer v. Rock County Savings & Trust Co. (*In re* Estate of Thayer), 41 Wis. 2d 55, 163 N.W.2d 142 (1968). *Cf.* Katz v. Usdan (*In re* Estate of Weinstock), 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976) (attorney's conduct in having himself and his father named as coexecutors was unethical even though they had just been retained to draft testator's will).

390. *See* H. DRINKER, *supra* note 9, at 94.

391. *See* Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 430–32, 170 P.2d 748, 753 (1946); E. TOMLINSON, *supra* note 188, §§ 3.1–3.11. *See generally* T. ATKINSON, *supra* note 139, at 561–628.

these interests may conflict at times,[392] generally this is not the case with regard to employment of counsel. Here, the executor has a duty to retain competent counsel who will provide independent legal advice.[393] If a number of attorneys in a particular community are sufficiently qualified to provide such representation, then other factors like the cost of the legal services should be controlling.[394] For example, if a competent lawyer is willing to provide legal assistance on behalf of an estate for a fee of $6,000, while others would charge in the range of $10,000 for the same work, the corporate fiduciary would appear to be under an obligation to retain the less expensive attorney and save $4,000 in fees, which would ultimately increase the amount to be distributed to the beneficiaries of the estate. Thus, the automatic retention of the draftsman, without exploring the possibility of employing other counsel, seems to be inconsistent with the corporate executor's fiduciary responsibilities.

D. *Regulation Through Disciplinary Proceedings*

Some aspects of this problem can and should be regulated through disciplinary action against unethical attorney conduct. As one court has noted, "an attorney may urge the selection of a corporate executor, who will be likely to reciprocate by employing him as the attorney."[395] Although the temptations may be great, an attorney should not attempt to persuade a client to name a corporate fiduciary in order to secure probate business.[396] If a testator independently decides to designate a bank as executor, it would clearly be the drafting attorney's responsibility to advise his or her client of the policy of corporate fiduciaries to name the draftsman as attorney for purposes of administering the estate.[397] It is unfortunate, indeed, that neither the current Code of Professional Responsibility nor the new Model Rules of Professional Conduct contain any provisions that prohibit a lawyer from counseling a client to designate a corporate fiduciary in order to secure appointment as attorney for the

392. *See, e.g.*, E. TOMLINSON, *supra* note 188, at 49 (executor's duty to refrain from giving preference to one beneficiary's interest over another's). *See also* Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976) (attorney named as executor and as beneficiary had interests conflicting with his duty to administer the estate in a fair manner for the benefit of the other legatees); Jackson v. Conland, 178 Conn. 52, 420 A.2d 898 (1979) (conflict of interest between trustee's duties toward trust beneficiaries and his duties as attorney for firm that represented the trust).

393. *See, e.g.*, Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 430–32, 170 P.2d 748, 753 (1946); *In re* Longworth, 222 A.2d 561 (Me. 1966) (bank's analogous duty to recommend to estate planning customer an attorney who will provide independent advice).

394. Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 430–32, 170 P.2d 748, 753 (1946); *Cf.* Colorado State Bd. of Agriculture v. First Nat'l Bank (*In re* Estate of Painter), 39 Colo. App. 506, 567 P.2d 820 (1977) (reflecting greater cost-consciousness by courts and beneficiaries with regard to attorneys' and executors' fees). *See generally* E. TOMLINSON, *supra* note 188, at 295–97.

395. Thayer v. Rock County Savings & Trust Co. (*In re* Estate of Thayer), 41 Wis. 2d 55, 63, 163 N.W.2d 142, 146 (1968).

396. *Id.* Since it is unethical for a draftsman to recommend or suggest inclusion of a clause naming himself or herself as attorney to probate the estate, a lawyer should not be able to accomplish the same thing indirectly, by recommending or suggesting the appointment of a bank as executor, with the knowledge that the bank always selects the scrivener to provide legal services to the estate. *Cf.* State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

397. *See Role and Function of the Estate Lawyer*, *supra* note 5, at 238.

estate.[398] But even if a precise rule were adopted, it would be difficult to enforce because of the many legitimate reasons for the selection of a bank to serve as executor.[399]

This creates a serious dilemma. If, as proposed, an all-inclusive ethical rule were adopted that would preclude lawyers from preparing a will containing a clause designating the draftsman to serve as attorney for the estate,[400] nothing would prevent the same practitioners from doing what others undoubtedly already do, and persuade their clients to select a bank to serve as executor. In view of the widespread policy among corporate fiduciaries of naming the draftsman as attorney for the estate, an attorney, if so inclined, could readily achieve the same desired appointment as attorney for the testator's estate without even the "appearance of impropriety"[401] that would be inherent in a will specifically making such a designation. Accordingly, enforcement of an ethical provision prohibiting the naming of an attorney in a will would serve little purpose if the drafting lawyer could avoid the problem simply by urging that a bank be named as executor. This alternative may not be quite as attractive, however, in those jurisdictions in which attorneys' fees for probate work are based on factors other than a percentage of the estate,[402] since a corporate fiduciary, as opposed to most individual executors, is likely to perform more services for the estate, thereby reducing the amount of work for the attorney.[403]

E. *Statutory Provisions Governing Conduct of Corporate Fiduciaries*

The extensive practice of corporate fiduciaries in retaining the services of the attorney who prepared the will is virtually impossible to control through rules relating to legal ethics, since the pertinent policy has been implemented by banks, which are not subject to provisions intended to regulate the conduct of attorneys. The only solution is the enactment of legislation that would govern the activity of banking institutions as well as members of the bar.

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398. EC 5-6 provides, "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983). Thus, it is certainly arguable that it is implicit in EC 5-6 that a lawyer also should not "consciously influence" a client to name a bank as executor in order to assure the lawyer's selection as attorney for the estate.

399. *See* S. KESS & B. WESTLIN, *supra* note 273, ¶¶ 235–36; 3 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS form 8.39, comment (1983).

400. *See supra* text accompanying notes 354–67.

401. The "appearance of impropriety" has always been of grave concern in the estate planning context. Thus, EC 5-6 is written in terms of avoiding the "appearance of impropriety" when a lawyer draws a will in which he or she is named as executor, trustee, or lawyer. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983). *See also In Re* Krotenberg, 111 Ariz. 251, 253, 527 P.2d 510, 512 (1974) ("We are concerned not only with evil but the appearance of evil as well."); Committee on Professional Ethics v. Behnke, 276 N.W.2d 838, 844 (Iowa), *appeal dismissed*, 444 U.S. 805 (1979) ("The bench and bar are increasingly sensitive to the appearance of impropriety inherent in these situations."); State v. Collentine, 39 Wis. 2d 325, 332, 159 N.W.2d 50, 53 (1968) ("The subjective innocence of Jonn R. Collentine, however, does not undo the damage he has done the legal profession."); State v. Horan, 21 Wis. 2d 66, 70, 123 N.W.2d 488, 490 (1963) ("An attorney has a duty not to harm but to maintain the integrity of the legal profession even though this may call for a personal sacrifice or the omission of acts which are not intrinsically bad.").

402. *See, e.g.*, Wright v. Heron (*In re* Estate of Wright), 132 Ariz. 555, 647 P.2d 1153 (1982); Colorado State Bd. of Agriculture v. First Nat'l Bank (*In re* Estate of Painter), 39 Colo. App. 506, 567 P.2d 820 (1977); Ryan, *Attorneys' Fees and Other Matters*, 16 REAL PROP. PROB. & TR. J. 795, 795–98 (1981).

403. Eubank, *supra* note 290, at 223; *A Bakers' Dozen Topics*, *supra* note 180, at 245; *Lawyers Serving As Executors and Trustees*, *supra* note 180, at 751–52.

Long-standing legislation in Wisconsin, which apparently has only one counterpart in other jurisdictions,[404] offers a possible solution to the problems presented by the prevalent practice of corporate executors in employing the services of draftsmen to probate testators' estates. According to the Probate Code of Wisconsin:

> Whenever a corporate fiduciary is appointed as the sole personal respresentative, the person or persons receiving the majority interest from the estate may within 30 days after the date of the appointment select the attorney who shall represent the personal representative in all proceedings of any kind or nature unless good cause is shown before the court why selection should not be so made, or unless the testator's will names the attorney or firm who shall represent the personal representative . . . .[405]

Originally enacted in 1913,[406] Wisconsin adopted its statute to prevent a monopoly of probate business in a few select lawyers.[407] Under the legislation, the principal beneficiaries of an estate generally control the employment of an attorney to provide legal services, rather than the bank that, under the terms of a given will, has been appointed as executor. It would seem, therefore, that in the early part of this century, in Wisconsin at least, trust institutions did not have a policy of retaining the services of the lawyer who drafted the will, but, instead, apparently used this opportunity to favor a few practitioners with whom the corporate fiduciaries had long-term working relationships.[408] This custom would obviously have been resented by other lawyers who did not have an opportunity to compete for this business, and legislation was enacted placing the selection of attorneys in the hands of the principal beneficiar-

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404. Louisiana also has a statutory provision, which appears as part of its banking laws, that has a similar purpose and effect: "The designation in any testament of an attorney for the succession, or the selection of an attorney by the surviving spouse or heirs, is binding upon the bank [appointed as executor or administrator]." LA. REV. STAT. ANN. § 6:322(6) (West Supp. 1983). The first clause of the quoted provision simply serves as a statutory confirmation of the fact that in Louisiana a designation in a will of an attorney to provide legal services to the estate is binding on the executor. *See supra* note 310 and accompanying text. The portion of § 6:322(6) relating to the selection of an attorney appears to have been the subject of litigation in only one case. In Succession of Stovall, 193 So. 2d 368 (La. Ct. App. 1966), the court held that the testator's great-grandchildren, who were legatees under his will, were not "heirs" who would be entitled to select the attorney for the executor. Thus, as interpreted, § 6:322(6) is more limited than the Wisconsin legislation because it is only a "surviving spouse" or "heirs" who are named in a will that are entitled to participate in the selection of the attorney, and, then, only if the will in question does not designate a legal representative, which appears to be common in that jurisdiction.

405. WIS. STAT. ANN. § 856.31 (West Supp. 1982–1983).

406. Act of June 23, 1913, ch. 658, 1913 Wis. Laws 871.

407. *See* Sutherland v. Weinke (*In re* Estate of Ainsworth), 52 Wis. 2d 152, 158–59, 187 N.W.2d 828, 831 (1971); Biart v. First Nat'l Bank (*In re* Ogg's Estate), 262 Wis. 181, 191, 54 N.W.2d 175, 179–80 (1952); Comment, *Wills—Effect of Testamentary Designation of Counsel for the Executor*, 31 MARQ. L. REV. 231, 236 (1947); Note, *Wills—Direction to Employ Certain Attorney for Probate*, 36 MARQ. L. REV. 211, 214 (1952).

408. According to the Wisconsin Supreme Court, "the statute was aimed to prevent the real, or fancied, evil of corporations acting as executors playing favorites in selecting counsel, thus tending to create a monopoly in probate business by such favorite counsel." Biart v. First Nat'l Bank (*In re* Ogg's Estate), 262 Wis. 181, 191, 54 N.W.2d 175, 180 (1952). Apparently, some practitioners still have a concern about the close working relationship between banks and a few select lawyers. *See* Sussman, Cates & Smith, *supra* note 185, at 46.

Interestingly, while the Wisconsin statute dates back to 1913, its Louisiana counterpart, *supra* note 404, also has lived a long life, having been enacted in 1902. Act of June 21, 1902, § 1, 1902 La. Acts 59, 59–61.

ies. Although it has been revised a number of times in its seventy-year history, the changes to this statute have been largely procedural,[409] and the basic provisions have remained substantially the same.[410]

F. *A Proposed Statutory Provision to Counterbalance Bank "Policy"*

Enactment of a statute to counterbalance the practices of corporate fiduciaries would serve a purpose different from, but even more salutary than, that originally served by the Wisconsin statute. Such legislation would effectively neutralize the pervasive policy whereby trust institutions select attorneys who drafted the wills as a *quid pro quo* for the designation of banks as executors. In fact, legislation is essential due to the compelling business logic of the reciprocity underlying such "policy," since any milder form of restriction probably would not serve its purpose.[411] Accordingly, if a statute were passed prohibiting corporate fiduciaries from selecting counsel for the estate, trust institutions would be precluded from consistently employing the draftsman of the will. The principal beneficiaries presumably would be inclined to retain the attorney who prepared the testator's will,[412] but that propensity falls far short of the ironclad policy presently followed by the banks in this country. Furthermore, since beneficiaries and not corporate fiduciaries would select the attorneys to provide legal services in connection with estate administration, lawyers engaged in estate planning would be motivated by factors other than self-interest in recommending that a bank serve as executor.

One of the major objections that could be raised about such a statutory provision is that the executor would be deprived of the right to choose the individual who is to serve as the fiduciary's attorney. Historically, the lawyer who is retained for purposes

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409. Compare the original provisions of Act of June 23, 1913, ch. 658, 1913 Wis. Laws 871 with the latest revisions in Act of May 31, 1974, ch. 233, § 3, 1973 Wis. Laws 717, 718–19 and Act of June 12, 1976, ch. 331, § 13, 1975 Wis. Laws 955, 957.

410. Thus, in its original version the statute applied whenever a "firm or corporation" was named "administrator or executor" of an estate, and the "nearest of kin who receive[d] any interest" in the estate or the person who otherwise received "the largest amount or interest" from the estate named the attorney to represent the estate. However, the statute did not apply if "good cause" was shown why that procedure should not be followed. Act of June 23, 1913, ch. 658, 1913 Wis. Laws 871. After the latest modification, the statute applies if a corporate fiduciary is appointed as the sole personal representative, and if the "person or persons receiving the majority interest from the estate" selected the attorney to represent the estate. Similarly, the statute does not apply if "good cause" is shown, or if "the testator's will names the attorney or firm who shall represent the personal representative." WIS. STAT. ANN. § 856.31 (West Supp. 1982–1983). The last clause, making the testator's selection of an attorney binding, is not quite as dramatic a change as it may first appear to be, because this statutory modification is largely a codification of prior case law that had, at least in situations in which the corporate fiduciary was willing to comply with the request, interpreted a testator's designation in a will as mandatory. *See* Thayer v. Rock County Savings & Trust Co. (*In re* Estate of Thayer), 41 Wis. 2d 55, 163 N.W.2d 142 (1968); Biart v. First Nat'l Bank (*In re* Ogg's Estate), 262 Wis. 181, 54 N.W.2d 175 (1952).

411. Despite withdrawal of the various Statements of Principles by local and national groups of trust institutions and lawyers, it is obvious that the practice of corporate fiduciaries selecting the drafting attorney to represent the testator's estate is so well established that its full force and effect will continue for years to come. *See supra* text accompanying notes 368–80.

412. *See* J. BARNES, *supra* note 1, at 8. In some circumstances the attorney-draftsman will be sufficiently familiar with the testator's family and property holdings that he or she would be a logical choice to perform legal services on behalf of the executor. NEB. L. REV. Comment, *supra* note 9, at 457.

of probate administration has been viewed as representing the executor rather than the estate or the beneficiaries of the estate.[413] Similarly, the executor is considered liable to third parties for the attorney's acts[414] and responsible for payment to the attorney for the services that he or she renders.[415] Nevertheless, it is the devisees and legatees, rather than the executor, that stand to benefit the most from the attorney's efforts. The executor will generally be reimbursed by the estate for any liability to the attorney for fees or to third parties for the attorney's actions.[416] Therefore, it is the beneficiaries who ultimately bear the burden of such expenses. The lawyer thus renders services for the well-being of beneficiaries named in the will, and in a real sense the attorney represents the interests of those beneficiaries. Taken in this context, it is not illogical or improper for the will beneficiaries to be able to select the individual who is to serve as attorney.

Furthermore, it can hardly be argued that selection by the beneficiaries would impose an intolerable burden on a corporate fiduciary by requiring it to work closely with someone not of its own choosing, when, under the dominant policy presently in existence, a corporate executor does not have any real choice in the matter, since it simply employs the attorney who drew the will to provide legal services for the estate. If a bank can work effectively with any lawyer who happened to have prepared a particular will, then it can work equally well with any lawyer retained by the beneficiaries of the estate.

Individual executors, of course, would not be affected by legislation based on the Wisconsin model, since it would apply only to situations in which a corporate fiduciary has been named as executor.[417] Thus, a person who has been designated as executor would still be entitled to select the lawyer who would be retained to perform legal services on behalf of the estate.[418] The individuals who are most likely to be named as executors are members of a testator's family, and they will hardly have an automatic "policy" of employing the draftsman as attorney. Accordingly, the right

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413. There is no such office or position known to the law as "Attorney of an Estate." When an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, he acts as the attorney of the executor, and not of the estate . . . .

In re Estate of Ogier, 101 Cal. 381, 385, 35 P. 900, 901 (1894). *See also supra* note 288.

414. *See, e.g.*, Highfield v. Bozio, 188 Cal. 727, 207 P. 242 (1922); *In re* Estate of Ogier, 101 Cal. 381, 35 P. 900 (1894); *In re* Caldwell, 188 N.Y. 115, 80 N.E. 663 (1907); Laus v. Braasch (*In re* Braasch's Estate), 274 Wis. 569, 80 N.W.2d 759 (1957).

415. Coyle v. Velie Motors Corp., 305 Ill. App. 135, 27 N.E.2d 60 (1940); Lewis v. Morgan, 132 N.J. Eq. 343, 28 A.2d 215 (1942); Lachmund v. Moody (*In re* Lachmund's Estate), 179 Or. 420, 170 P.2d 748 (1946).

416. *See* T. ATKINSON, *supra* note 139, at 654–55; E. TOMLINSON, *supra* note 188, §§ 20.3–1 to –2(a).

417. On its face, the statute applies only when a "corporate fiduciary" has been appointed as personal representative. WIS. STAT. ANN. § 856.31 (West Supp. 1982–83). The Louisiana statute similarly applies on its face when a bank is an executor or administrator. LA. REV. STAT. ANN. § 6:322(6) (West Supp. 1983). Thus, if the will is silent and if an individual is named executor, then that person, and not the surviving spouse or heirs, is entitled to select the counsel that is retained.

418. Several Wisconsin cases make it clear that when an individual is designated as executor, that person, and not the desires of the testator or the beneficiaries under the will, is entitled to select the attorney. Sutherland v. Weinke (*In re* Estate of Ainsworth), 52 Wis. 2d 152, 187 N.W.2d 828 (1971); Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 128 N.W.2d 443 (1964).

of such individuals to designate an attorney to assist in probate can hardly be considered contrary to the public interest.[419]

However, one provision in the Wisconsin legislation serves no legitimate purpose, is inconsistent with sound public policy, and therefore should be omitted from any statute giving estate beneficiaries, rather than the corporate fiduciary, the right to select the attorney for the estate. Buried in the Wisconsin statute is language that overrides the right of the beneficiaries to designate the lawyer when "the testator's will names the attorney or firm who shall represent the personal representative."[420] This exception, which was first added to the statute in 1973,[421] appears to be partly attributable to an effort to incorporate the holdings of several cases that construed the legislation[422] and partly in retaliation for the Wisconsin Supreme Court's 1972 decision in *State v. Gulbankian*,[423] which was highly critical of the practice of lawyers who regularly prepare wills naming themselves as attorneys. Unfortunately, this modification is an open invitation to lawyers in Wisconsin to draft wills providing for their own retention. Moreover, since a statutory justification now exists for such a will clause in Wisconsin, at least when a corporate executor is nominated, it will be considerably more difficult for the courts in that state to conclude, as indicated in *Gulbankian*, that inclusion of these provisions is unethical.[424] If lawyers are not ethically permitted to prepare wills in which they or their law firms are designated as attorneys for the testator's estate, then, obviously, a statute should not be adopted sanctioning such conduct in the context of a will naming a corporate executor.

Enactment of a statute along these proposed lines would prevent evasion of an ethical rule prohibiting lawyers from drawing wills in which they are designated as attorneys for testators' estates. This statute would effectively serve to preclude attorneys from recommending that a corporate executor be named in order to secure future

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419. By contrast, the practice of corporate fiduciaries automatically employing the attorney who drafted the will that named the bank as personal representative may be against public policy because it permits an attorney to secure his or her own employment in the future by designating a bank as executor, without the testator having any inkling concerning the consequences of the fiduciary appointment. In Pedrick v. First Nat'l Bank, 267 Wis. 436, 66 N.W.2d 154 (1954), the Wisconsin Supreme Court held that a contractual commitment that a bank would employ a particular attorney to probate estates whenever a will drawn by that individual named the bank as executor was contrary to public policy. Distinguishing the corporate fiduciary from an individual named as personal representative, the court pointed out that "[n]o such concentration of the power of appointing attorneys is present when wills nominate individual executors." *Id.* at 440, 66 N.W.2d at 156.

Further, the retention of the draftsman as attorney to provide legal services to the estate may not be what the testator had in mind when a decision was made to name a corporate rather than an individual executor. *See* Hyrne, *supra* note 368, at 671. In the analogous situation presented in Estate of Karabatian v. Hnot, 17 Mich. App. 541, 170 N.W.2d 166 (1969), the court held that the attorney's conduct so violated the spirit of the code of ethics that the bequest to the attorney–draftsman was void as against public policy.

420. WIS. STAT. ANN. § 856.31 (West Supp. 1982–83).

421. Act of May 31, 1974, § 3, 1973 Wis. Laws 717, 718–19.

422. According to cases decided prior to the 1973 amendment, if the testator's will indicated a preference for a particular attorney and if the corporate fiduciary designated in the will was willing to employ either the lawyer specified by the testator or a different attorney selected by the beneficiaries, the testator's desires prevailed. Thayer v. Rock County Savings & Trust Co. (*In re* Estate of Thayer), 41 Wis. 2d 55, 163 N.W.2d 142 (1968); Biart v. First Nat'l Bank (*In re* Ogg's Estate), 262 Wis. 181, 54 N.W.2d 175 (1952).

423. 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

424. *Id.* at 610–12, 196 N.W.2d at 736–37.

business as a consequence of the widely adopted policy of employing the draftsman as attorney for the estate. While such legislation would undoubtedly raise questions concerning its construction and application, the experience in Wisconsin strongly suggests that such issues can readily be resolved through judicial interpretation.[425]

VI. ATTORNEY "SAFEKEEPING" OF CLIENTS' WILLS

Upon execution of a will, an important question is often raised — where should the testator's will be kept?[426] The original will should be placed in a safe location where other persons who have a potential interest in the testator's estate will not have access to it.[427] If, for example, a will was kept in a desk at home, someone who would stand to gain by intestacy might locate the will and mutilate or destroy it during the testator's last illness or immediately after death.[428] If the original of a will is traced to the testator's possession but cannot be located at death, there is a presumption in a number of jurisdictions that the testator destroyed the will with the intention of revoking it.[429] Similarly, if the original is found, but it has been torn up or otherwise defaced in a manner consistent with the statutory requirements for revocation by physical act, then a presumption may arise that the testator intentionally revoked the will prior to death.[430] In view of the testator's death, it could be difficult to overcome these presumptions in favor of a will's continuing validity.

A number of locations are generally recommended as safe places to keep the original will, including the testator's own safe-deposit box,[431] the lockbox of a close

425. A number of cases have construed the provisions of § 856.31 of the Wisconsin Statutes. *See, e.g.*, Sutherland v. Weinke (*In re* Estate of Ainsworth), 52 Wis. 2d 152, 187 N.W.2d 828 (1971) (statute only applicable to corporate fiduciaries; individual executor entitled to select counsel); Behr v. First Nat'l Bank (*In re* Estate of Behr), 42 Wis. 2d 72, 165 N.W.2d 394 (1969) (policy of bank never to serve as executor unless attorney who drafted will is employed to provide legal services to estate does not constitute "good cause" to exempt bank from statutory requirements); Thayer v. Rock County Savings & Trust Co. (*In re* Estate of Thayer), 41 Wis. 2d 55, 163 N.W.2d 142 (1968) (when corporate fiduciary remains neutral, designation of attorney in will controls over desires of beneficiaries); Estate of Sieben v. Phillips (*In re* Sieben's Estate), 24 Wis. 2d 166, 128 N.W.2d 443 (1964) (will provision specifying an attorney not binding on individual executor); Pedrick v. First Nat'l Bank, 267 Wis. 436, 66 N.W.2d 154 (1954) (agreement in advance that bank will always employ specific attorney to probate estates in which it is named executor violates public policy reflected by § 856.31); Biart v. First Nat'l Bank (*In re* Ogg's Estate), 262 Wis. 181, 54 N.W.2d 175 (1952) (when corporate fiduciary has no preference, provision in will specifying attorney governs over beneficiaries' desire to employ other counsel). As previously indicated (*supra* note 404), even though § 6:322(6) of the Louisiana Revised Statutes has been on the books for over 80 years, apparently only one case has interpreted its terms regarding post-mortem selection of counsel. *See* Succession of Stovall, 193 So. 2d 368 (La. Ct. App. 1966).

426. *See, e.g.*, C. LYMAN *supra* note 1, at 127; Herman, *supra* note 1, at 50, col. 1.

427. *See* Mimms v. Hunt, 458 S.W.2d 759, 761 (Ky. 1970); Heaverne v. Burleigh (*In re* Heaverne's Estate), 118 Or. 308, 314–15, 246 P. 720, 722 (1926); W. CASEY, FORMS OF WILLS, TRUSTS, AND FAMILY AGREEMENTS WITH TAX IDEAS 596 (1963); 1 A. CASNER, *supra* note 4, at 143.

428. *See* Herman, *supra* note 1, at 50, col. 1. Also, since an original will kept in the testator's desk could be destroyed by a fire, a will kept at home should be placed in a fireproof receptacle like a safe. C. LYMAN, *supra* note 1, at 127.

429. *See* 3 PAGE ON WILLS, *supra* note 26, at § 29.139; T. ATKINSON, *supra* note 139, at 442–43. *See also* Mimms v. Hunt, 458 S.W.2d 759 (Ky. 1970); Ferguson v. Billups, 244 Ky. 85, 50 S.W.2d 35 (1932); Coghlin v. White, 273 Mass. 53, 172 N.E. 786 (1930).

430. *See* 3 PAGE ON WILLS, *supra* note 26, at § 29.140; T. ATKINSON, *supra* note 139, at 442. *See also* Porch v. Farmer, 158 Ga. 55, 122 S.E. 557 (1924); *In re* Barrie's Will, 393 Ill. 111, 65 N.E.2d 433 (1946); Bonner v. Borst (*In re* Will of Bonner), 17 N.Y.2d 9, 214 N.E.2d 154, 266 N.Y.S.2d 971 (1966); Dawley v. Congden, 42 R.I. 58, 105 A. 393 (1919).

431. *See* 1 A. CASNER, *supra* note 4, at 143; W. CLAY, THE DOW JONES—IRWIN GUIDE TO ESTATE PLANNING 85 (1976); R. LYNN, *supra* note 3, at 102.

relative,[432] in the possession of the corporate fiduciary named in the will as trustee or executor,[433] or on file with the county clerk in those states that have a statutory provision for the maintenance of wills during testators' lifetimes.[434] Another popular alternative is for the testator to leave the will with the lawyer who prepared it. Because it is a common practice for attorneys engaged in estate planning to serve as custodians for wills they have drafted, these attorneys either maintain a safe-deposit box in a bank for this purpose or file the original documents in a safe or vault located in their offices.[435]

A. *Attorneys' Motivations in Serving as Custodians*

Undoubtedly, attorneys provide this free service to their clients for a variety of reasons. One possibility is the desire of attorneys, without ulterior motive, to help their clients avoid the dangers associated with retention of a will in their homes.[436] This service-oriented explanation is more plausible when the attorney has a continuing relationship with the testator than when preparation of the will was an isolated transaction, with little likelihood that the testator will be a source of additional business. Moreover, the prevailing fee structure for estate planning work raises a substantial question about the existence of these altruistic motives. Although considerable discussion has occurred during the last decade or two about charging for estate planning services on a straight hourly rate basis,[437] the fact remains that such work is still undertaken largely for fixed fees significantly below what lawyers charge

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432. C. LYMAN, *supra* note 1, at 127. Of course, a relative who would also be an heir would not make a good custodian unless that person stood to gain by the provisions of the will. Moreover, the testator might find it difficult to ask such a relative for the original will if he or she wanted to make a new will. Under the circumstances, it might be better to find another place to keep the original, but to tell the close relative where the original is located (*e.g.*, in the testator's safe-deposit box). *See* L. DIXON, WILLS, DEATH AND TAXES 38 (rev. ed. 1977).

433. W. CASEY, *supra* note 427, at 596; 1 A. CASNER, *supra* note 4, at 143; C. LYMAN, *supra* note 1, at 127. Even if the executor-designate was an individual, that person might also be an appropriate custodian of a will. The testator, however, still might be hesitant to ask such an individual to give the will back. Although a testator might also be hesitant along these same lines if a corporate fiduciary had possession of the original will, that concern does not seem nearly as great as in the case of an individual.

434. *See* 1 A. CASNER, *supra* note 4, at 143; L. DIXON, *supra* note 432, at 38; R. LYNN, *supra* note 3, at 102.

435. *See* J. BARNES, *supra* note 1, at 8; A. CASNER, *supra* note 4, at 143; C. LYMAN, *supra* note 1, at 127. The ethical propriety of attorney safekeeping of clients' wills has been directly questioned in only one reported case. State v. Gulbankian, 54 Wis. 2d 605, 611, 196 N.W.2d 733, 736 (1972). This common practice, however, has been noted in passing in a number of decisions. *See, e.g.*, *In re* Estate of Nelson, 232 So.2d 222, 223 (Fla. Dist. Ct. App. 1970); *In re* Estate of Ankeny, 238 Iowa 754, 758–59, 762, 28 N.W.2d 414, 416, 418 (1947); Heaverne v. Burleigh, (*In re* Heaverne's Estate), 118 Or. 308, 314–15, 246 P. 720, 722 (1926); Nelson v. First Northwestern Trust Co. (*In re* Estate of Nelson), 274 N.W.2d 584, 589 (S.D. 1978). In addition, questions about various aspects of attorney safekeeping of wills has been a frequent topic of state ethics opinions. *See* Opinion No. 76–6 (Ariz. June 3, 1976), *reported in* MARU 1980 *supra* note 12, at 37, No. 10415; Opinion No. 76–7, 61 MASS. L.Q. 119 (1976); Opinion No. 71–6 (Neb.), *reported in* MARU 1975, *supra* note 12, at 270, No. 8735; Opinion No. 341, 46 N.Y. ST. B.J. 460 (1974); Opinion No. CPR–52 (July 18, 1975), 22 N.C.B. 24, *reported in* MARU 1980, *supra* note 12, at 441, No. 12303; Opinion No. 3343, 37 OR. ST. B. BULL. (Special Insert, Oct. 1976); Opinion No. 103, WASH. ST. B. 115 (Apr. 1962), *reported in* O. MARU & R. CLOUGH, *supra* note 345, at 506, No. 4621; Opinion No. 22–1973, 47 WIS. B. BULL. 29 (Supp. Dec. 1974), *reported in* MARU 1975, *supra* note 12, at 499, No. 10176.

436. *See, e.g.*, Heaverne v. Burleigh (*In re* Heaverne's Estate), 118 Or. 308, 314–15, 246 P. 720, 722 (1926); Johnson, *supra* note 1, at 53.

437. *See, e.g.*, Meyer, *An Approach to the Question of Fees in Estate Planning*, 2 INST. ON EST. PLAN. ¶ 68.400, at 4–22 to –24 (1968); Wormser, *Charging For Estate Planning—Methods and Problems*, 10 INST. ON EST. PLAN. ¶¶ 800, 810 (1976); *A Bakers' Dozen Topics*, *supra* note 180, at 243–44.

for comparable work involving the same time, skill, and effort.[438] Since most practitioners are inadequately compensated for their work in preparing wills, trusts, and related documents, it seems unlikely that these same lawyers would be interested in serving as custodians, without charge, simply to provide a service to their clients.

Other factors unquestionably play a significant role in the willingness of practitioners to take custody of original wills for their clients. An attorney who has prepared a client's will and is safekeeping that document is more likely to be retained by that testator when the will needs to be modified than if the client has possession of the original.[439] Retention of original wills, therefore, can enhance a lawyer's future estate planning practice. Serving as custodian of the original will is also seen as a way of maintaining with the testator a continuing relationship that might lead to other, more profitable legal business.[440]

The fact that the attorney-draftsman has the original will in his or her possession, rather than just a file copy, may impose an obligation on the attorney to contact clients or former clients[441] regarding review and revision of wills necessitated by changes in the tax laws, the economy, or family relationships.[442] For example, the vast modifications in the Federal Estate and Gift Tax laws brought about by the Tax Reform Act of 1976[443] and the Economic Recovery Tax Act of 1981[444] caused estate planners throughout the country to review their records and contact clients for whom they had prepared wills and trusts about the possible need to overhaul these documents because of the substantial alterations in the tax laws.[445] The amount of work

438. *See, e.g.*, Eubank, *supra* note 290, at 231; Kram, *supra* note 3, at 493; Sussman, Cates & Smith, *supra* note 185, at 43–45. Wormser, *supra* note 437, at ¶ 804; Louisville Courier Journal, Sept. 13, 1981, at 1, col. 5 (survey of fees charged by 1,000 attorneys in Jefferson County, Ky., including fees for wills) [hereinafter cited as Jefferson County Survey].

439. *Accord* Opinion No. CPR–52 (July 18, 1975), 22 N.C.B. No.3, 1975, at 24, *reported in* MARU 1980, *supra* note 12, at 441, No. 12303; *cf.* Cantwell, *Estate Planning Economics: Getting a Client, Doing the Work, and Getting Paid*, 14 INST. ON EST. PLAN. ¶¶ 2000, 2001.3 (1980).

440. *Cf.* Cantwell, *supra* note 439, ¶ 2001.3; McCabe, *The Lawyer As Target: Today's Client Is Tomorrow's Plaintiff*, 48 PA. B. ASS'N Q. 525, 537–38 (1977).

441. Although the attorney-client relationship may technically have terminated when the testator executed the will, if a sufficient nexus exists between the parties, the attorney may be required to bring to the attention of the testator matters such as changes in the law. *See generally* Johnston, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 654–58 (1982). Furthermore, the failure of an attorney to keep a testator advised could result in liability for malpractice. *Id.*

442. A number of ethics opinions indicate that an attorney may have a "duty" to contact the testator periodically to discuss changes in the law. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 210 (1941); Informal Opinion No. 195, 57 MICH. ST. B.J. 316 (Special Issue, Feb. 1978), *reported in* MARU 1980 *supra* note 12, at 294, No. 11572; Opinion No. 188 (April 28, 1971), 44 N.Y. ST. B.J. 56 (1972); Opinion No. 554 (Nov. 6, 1940), OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE BAR OF THE CITY OF N.Y. AND THE N.Y. COUNTY LAWYERS' ASSOCIATION 311 (1956); Opinion No. 231 (N.Y. County June 17, 1932), *id.* at 114; Opinion No. 813, N.C. ST. B. II–255, *reported in* MARU 1975, *supra* note 12, at 417, No. 9564; Advisory Opinion No. 209, 32 OKLA. B.J. 1570 (1961); Tulsa County Ethics Opinion, TULSA LAW., Sept. 1970, at 6. This "duty" may be even clearer when the attorney has custody of the original will. *See* Opinion No. CPR–52, 22 N.C.B., No. 3, 1975, at 24, *reported in* MARU 1980, *supra* note 12, at 441, No. 12303; *cf.* Opinion No. 76–7, 61 MASS. L.Q. 119 (1976); Opinion No. 334, 37 OR. ST. B. BULL., (Special Insert, Oct. 1976). *But see* Opinion No. 39 (Miss. June 2, 1977), *reported in* MARU 1980, *supra* note 12, at 318, No. 11735, in which the committee took the position that preparation of a will was a single act of representation which placed no obligation on the draftsman to notify the testator of any changes in the law. The committee went on to hold that even though an attorney was under no duty to do so, he or she could choose to notify testators of any changes.

443. Pub. L. No. 94–455, 90 Stat. 1520 (1976) (codified as amended in scattered sections of 26 U.S.C.).

444. Pub. L. No. 97–34, 95 Stat. 172 (1981) (codified as amended in scattered sections of 26 U.S.C.).

445. *See, e.g.*, Bissell, *Malpractice Insurance Coverage for Members of the Estate Planning Team*, 11 INST. ON EST. PLAN. ¶¶ 200, 211 (1977); Wormser, *supra* note 437, ¶ 816.

required as a consequence of these changes was viewed by some lawyers in large, established firms as a Herculean task that they undertook reluctantly,[446] but for many lawyers trying to expand their estate planning practices the "duty" to contact clients and advise them of the desirability of reviewing their estate plans was more of a benefit than a burden.[447] In the event that revisions of the tax laws or other comparable changes resulted in the need for a new will or trust, the likelihood of a client returning to the attorney who initially drafted these documents would be considerably greater if the attorney had custody of the original instrument. While it would not be necessary to take the original of a will, rather than a copy, to a new lawyer for revision, the testator might not know this, and he or she might therefore be reluctant to ask the attorney who drafted the will and was holding it for safekeeping to return the original so that the testator could take it to another practitioner for modification.[448]

An estate planning practitioner is also motivated to serve as custodian for a newly executed will because possession of the will undoubtedly enhances the chances of his or her employment after the testator's death.[449] In the event that the attorney is aware of the client's demise, he or she will typically contact the executor-designate in order to notify that person or entity of the attorney's possession of the original will.[450] The executor named in the will, or a close family member, might also call the lawyer soon after the testator's death to inquire about the original will in order to initiate probate.[451] In either case, the chances of employment are increased because the attorney-draftsman has the original will; this provides a unique opportunity for an early face-to-face meeting with the executor or close relative during which the lawyer can explain the probate process, describe the legal services that will be necessary, and offer to provide those services.[452] Under these circumstances, it would be difficult for the executor to hire another attorney, and the safekeeping has served its purpose. In practice, the process works so well that one commentator has described the employment of the draftsman-custodian as "almost automatic."[453]

B. *Ethical Problems in the "Safekeeping" of Wills*

Because safekeeping is a potent device in ensuring subsequent employment, it raises a number of ethical concerns. By offering to keep the original will, the

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446. *See* Cantwell, *supra* note 439, ¶ 2001.3.

447. *Id.*; McCabe, *supra* note 440, at 537–38.

448. *See* C. LYMAN, *supra* note 1, at 127.

449. *See* State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972); J. BARNES, *supra* note 1, at 8; Johnson, *supra* note 1, at 53.

450. *See, e.g.*, Opinion No. 76–7, *reported in* 61 MASS. L.Q. 119 (1976).

451. *Cf.* Opinion No. 341, 46 N.Y. ST. B.J. 460 (1974) (law firm acting as will custodian need not inform client of attorney-drafter's retirement, as long as client is aware of the partnership).

452. *See* J. BARNES, *supra* note 1, at 8; *cf. In re* Rielly, 310 S.W.2d 524 (Ky. 1957), *supra* text accompanying notes 382–87. Although the attorney-draftsman in *In re* Rielly was held to have improperly solicited an executor for appointment as attorney for the estate, it is unlikely that such conduct would result in discipline today. *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) *with In re* Primus, 436 U.S. 412 (1978) *and* Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978). Furthermore, in *In re* Rielly the attorney-draftsman had a weaker basis for contacting the executor than if he had custody of the will needed to initiate the probate process.

453. J. BARNES, *supra* note 1, at 8.

attorney-draftsman has in effect engaged in solicitation and used the attorney-client relationship to further his or her own self-interest. This conduct may appear rather mild by comparison to the sort of in-person solicitation that is reflected in decisions such as *Ohralik v. Ohio State Bar Association*,[454] but at least the prospective clients in *Ohralik* were generally aware of the purpose of the attorney's contacts and therefore were arguably in a better position to protect their own interests.[455] It is the subtlety of the safekeeper's solicitation that creates the real problem. A client who has just executed a will and is advised by the draftsman of the advantages of leaving it at the attorney's office can hardly be expected to comprehend the consequences of this offer in terms of the attorney's desire to secure additional legal business in the future.

The tendency to overreach in such situations is largely the product of a dilemma that estate planning practitioners have themselves created. Attorneys engaged in such work typically undercharge for their services,[456] and find it necessary to adopt questionable practices to increase the likelihood of their subsequent employment to probate the estate when substantial fees can be and often are earned.[457] Presumably, if estate planning was made more profitable at the outset, there would be less need to rely on employment after the testator's death to justify the "loss leader" approach,[458] and less dependence on questionable practices like the safekeeping of wills. Yet, there are few indications of any significant changes in the manner in which fees are charged for estate planning work,[459] and thus it is unlikely that this predicament will be resolved short of vigorous enforcement of ethical standards that prohibit these self-serving improprieties.

Although the Code of Professional Responsibility contains specific language concerning the ethical questions raised when a lawyer drafts a will in which he or she is named as executor or attorney for the estate,[460] no comparable section deals with the ethical aspects of the attorney-draftsman who serves as custodian for clients'

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454. 436 U.S. 447 (1978).

455. It is true, of course, that the lawyer's in-person solicitation in *Ohralik* was inexcusable, particularly since the prospective clients were only 18 years old. *Id.* at 449–52. Although the prospective clients may not have been capable of making informed judgments, they apparently were aware that Ohralik wanted to represent them in any claims arising out of their automobile accident. *Id.* Although one of the prospective clients said that "she really did not understand what was going on" when the attorney visited her, she had enough comprehension to report to her mother, who tried to repudiate her daughter's consent the following day. *Id.* at 451–52.

456. *See supra* note 438.

457. *See generally* P. STERN, *supra* note 185, at 34–38; Kabaker, *supra* note 185, at 577–86; *Fiduciary and Probate Counsel Fees in the Wake of* Goldfarb, *supra* note 186. It is interesting to note how the courts have responded to complaints about the large fees that attorneys earn for probate work. *Compare* Bank of America v. Koslow (*In re* Estate of Effron), 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981) *with* Colorado State Bd. of Agriculture v. First Nat'l Bank (*In re* Estate of Painter), 39 Colo. App. 506, 567 P.2d 820 (1977).

458. *See* Cantwell, *supra* note 439, ¶ 2004 n.26; Sussman, Kates & Smith, *supra* note 185, at 43–45; Wormser, *supra* note 437, ¶ 804.

459. *See, e.g.*, Cantwell, *supra* note 439, ¶ 2004 n.26; Wormser, *supra* note 437, ¶ 801, at 8–3, 8–4; Jefferson County Survey, *supra* note 438.

460. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-6 (1983). The new Model Rules of Professional Conduct, however, adopted by the ABA House of Delegates in August 1983, do not cover the ethical problems involved when a lawyer draftsman is named as executor or attorney in a will that he or she has drafted. *See* MODEL RULES OF PROFESSIONAL CONDUCT Legal Background, Rule 1.8(c) (Proposed Final Draft 1981).

wills. Nor, for that matter, do the newly adopted Model Rules of Professional Conduct contain any provision on safekeeping of wills. Although specific treatment would benefit the profession by providing notice to those attorneys who might otherwise act improperly or by furnishing explicit guidelines to those who seek to stay within ethical bounds, this does not mean that the conduct in question is not circumscribed by broad provisions relating to conflicts of interest and improper solicitation.[461] Even under the general terms of the original Canons of Professional Ethics, which were in effect from 1908 through 1969, an attorney's conduct in keeping a client's will in his or her office was considered subject to certain ethical restraints.[462]

State v. Gulbankian[463] appears to be the only reported decision that has denounced the widespread practice of attorney-safekeeping of client's wills. In addition to condemning attorneys' conduct in consistently preparing wills in which the draftsmen name themselves as executors or attorneys for the estate,[464] the Wisconsin Supreme Court was critical of the practice of retaining original wills:

> Nor do we approve of attorneys' "safekeeping" wills. In the old days this may have been explained on the ground many people did not have a safe place to keep their valuable papers, but there is little justification today because most people do have safekeeping boxes, and if not, sec. 853.09, Stats., provides for the deposit of a will with the register in probate for safekeeping during the lifetime of the testator. The correct practice is that the original will should be delivered to the testator and should only be kept by the attorney upon specific unsolicited request of the client.[465]

By contrast, a number of ethics opinions deal specifically with safekeeping of testators' wills.[466] The general theme that the various opinions adopt is that the practice of providing this type of custodial service is permissible if the testator has expressly requested that the attorney keep the original will.[467] But if the drafting attorney initially offers to furnish this service, the conduct is considered unethical.[468]

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461. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), 5-101(A) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8(a), 7.3 (1983). By way of analogy, attorneys were disciplined under the general provisions of the Canons of Professional Ethics (which were in effect from 1908 until 1970) for, *inter alia*, the preparation of a will in which they were named as beneficiaries, even though no specific ethical rule condemned such conduct. *See, e.g.*, State v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957); *In re* Kneeland, 233 Or. 241, 377 P.2d 861 (1963); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968); State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

462. *See, e.g.*, State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972) (disciplinary action covering attorneys' conduct from 1955 to 1971); Opinion No. 103 (Wash. Apr. 1963), *reported in* MARU & CLOUGH, *supra* note 345, at 506, No. 462; Opinion No. 280 (Tex.) *reprinted in* 18 BAYLOR L. REV. 352 (1966).

463. 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

464. *Id.* at 610-11, 196 N.W.2d at 736-37.

465. *Id.* at 611-12, 196 N.W.2d at 736.

466. *See supra* note 435 (listing state ethics opinions dealing with attorney safekeeping of clients' wills).

467. *See, e.g.*, Opinion No. 76-6 (Ariz. June 3, 1976), *reported in* MARU 1980, *supra* note 12, at 37, No. 10415; Opinion No. CPR-52, 22 N.C.B. No. 3, 1975, at 24, *reported in* MARU 1980, *supra* note 12, at 441, No. 12303; Opinion No. 103 (Apr. 1962), WASH. ST. B. 115, *reported in* MARU & CLOUGH, *supra* note 345, at 506, No. 4621.

468. *See, e.g.*, Opinion No. 22-1973, 47 WIS. B. BULL. 29 (Supp. Dec. 1974), *reported in* MARU 1975, *supra* note 12, at 499, No. 10176. *But see* Opinion No. 71-6 (Neb.), *reported in* MARU 1975, *supra* note 12, at 270, No. 8735, (attorney-draftsman could serve as custodian of a will if the safekeeping was done either at the client's request or with the client's permission).

An interesting ethics opinion issued by the Texas bar, in March 1964, found it unethical for the drafting attorney to include a clause providing that the will was to be executed in duplicate and that one of the originals was being retained by

Although the difference may seem reasonable on the surface, it again creates the quandary of attempting to determine whether the testator or the attorney initiated the discussion about maintaining custody of the will, after the testator has died and is no longer able to shed any light on this question.[469] Because of the difficulty of resolving this issue, any effective ethical rule governing the safekeeping of wills should not be based on such a nebulous distinction. Nevertheless, it is important to restrain attorney practices in this area because of the serious ethical problems inherent in such activity.

C. *Alternatives to Attorney's "Safekeeping" of Wills*

Before attempting to proscribe rules regulating attorney conduct in this area, the benefits to the client of having the draftsman retain the original will should be balanced against the ethical concerns. There are, of course, certain advantages in having the attorney serve as custodian, principally because this practice precludes the testator's retention of the will in an unsafe place where it might be subject to the whims and caprices of disgruntled heirs and beneficiaries.[470] Thus, leaving the original with the attorney-draftsman serves little purpose that cannot be achieved equally well through some alternative form of safekeeping that does not raise the same ethical questions of solicitation and self-dealing. The attorney should, of course, be certain to retain a copy of the client's will in the office files, so that it can be reviewed periodically to determine if a new will or codicil is necessary or desirable[471] and in order to assist in the probate of a client's will in the event that the original cannot be

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the draftsman. Opinion No. 280 (Tex.) *reprinted in* 18 BAYLOR L. REV. 352 (1966). According to the ethics committee:

> It is difficult to conceive of any good reason for a lawyer to include this paragraph in a will he has written. If the typed-original is available to one interested in the estate, it is unnecessary to know where the duplicate-original is. If the typed-original is lost or misplaced, the information in it regarding the location of the duplicate-original is also lost and does not aid in locating the duplicate-original. The most likely reason for a lawyer's using such a paragraph is to solicit the probate of the estate. The use of the statement violates Canon 24.

Id. It would be interesting to know how that same ethics committee would have reacted if a similar notation was included in the only original, retained by the drafting attorney, with a number of conformed photocopies provided to the testator. The notation would then have served a purpose, helping locate the original after the testator's death, but the solicitation motive would be just as apparent. Yet, if such a will clause were deemed ethically improper, it would seem that safekeeping of the will by the drafting attorney, without more, should similarly be deemed unethical. No ethics committee opinion has ever suggested that such safekeeping, per se, constitutes improper or questionable conduct. Even the Wisconsin Supreme Court's opinion in State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972), which was highly critical of attorneys' safekeeping of wills, stopped far short of total condemnation of that practice. The court stated that it was proper for the drafting attorney to retain the original will if it was the result of a "specific unsolicited request of the client." *Id.* at 612, 196 N.W.2d at 736.

469. *See supra* text accompanying notes 17–18, 40–41, 52–53, 129–31 (draftsman-beneficiary); *supra* text accompanying note 200 (draftsman named as executor); *supra* text accompanying notes 294–96 (lawyer who prepared will in which he or she is named as attorney to assist in probate of the will).

470. *See* Mimms v. Hunt, 458 S.W.2d 759, 759–60 (Ky. 1970); Bonner v. Borst (*In re* Will of Bonner), 17 N.Y.2d 9, 214 N.E.2d 154, 266 N.Y.S.2d 971 (1966); Heaverne v. Burleigh (*In re* Heaverne's Estate), 118 Or. 308, 314–15, 246 P. 720, 722 (1926); C. LYMAN, *supra* note 1, at 127 (danger of inadvertent destruction of original will when kept in testator's home); Herman, *supra* note 1, at 50, col. 1.

471. *See generally* T. ATKINSON, *supra* note 139, at 354; C. LYMAN, *supra* note 1, at 128–29; R. LYNN, *supra* note 3, at 102; Cantwell, *supra* note 439, ¶ 2001.3.

located after the testator's death.[472] But in either event, retention of a conformed copy will serve the client's purposes.[473]

As an alternative to leaving the original with the attorney who drafted it, the testator might keep the will in his or her own safe-deposit box.[474] Testators are often concerned about such a location for their wills because of the procedure in many jurisdictions of sealing safe-deposit boxes until a state inheritance tax official has inventoried the contents. Lawyers have presumably added their warnings along these lines as an inducement to clients to leave their original wills with them for safekeeping.[475] This drawback, however, has been greatly over-emphasized. In reality, there is usually little delay in making arrangements to obtain the original will from the decedent's box.[476] Furthermore, if a conformed copy is readily available, there is generally no need to have access to the original will immediately upon the testator's death.[477]

If the sealing of safe-deposit boxes presents a substantial problem in a particular jurisdiction, the testator can make arrangements to have the original placed in a relative's box.[478] For example, a husband might keep his wife's will in a box registered in his name, and she could keep her husband's will in her box. Also, a testator who has designated a corporate fiduciary to serve as trustee or executor may prefer to leave the original with the bank, which will often provide a safekeeping service when it has been named to serve in a fiduciary capacity.[479] Although some disadvantages may exist in leaving an original will with a corporate fiduciary under these circumstances, it is a better practice than having the draftsman retain the original for safekeeping.[480]

Another appropriate course of conduct is to file the original will with a county clerk in those jurisdictions that have statutes authorizing such safekeeping.[481] Even

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472. *See* T. ATKINSON, *supra* note 139, at 354, 506–13.

473. A copy of the will is conformed if it has been clearly marked as a "copy," with the date and the names of the testator and witnesses inserted, preferably typed rather than printed or handwritten (*e.g., /s/ Thomas T. Testator; /s/ Wilma W. Witness*). T. ATKINSON, *supra* note 139, at 354. *See also* 1 A. CASNER, *supra* note 4, at 143; C. LYMAN, *supra* note 1, at 128–29. In W. CASEY, *supra* note 427, at 596, it is recommended that copies of the will be conformed at the time of execution, to prevent the testator from inadvertently signing a blank copy at a later date. This advice is particularly valuable at the present time, since the quality of photocopies is now so good that it is often hard to tell them from original documents.

474. *See supra* note 431.

475. *See generally* W. CASEY, *supra* note 427, at 596; 1 A. CASNER, *supra* note 4, at 143 n.14; C. LYMAN, *supra* note 1, at 128; Herman, *supra* note 1, at 50, col. 1.

476. *See, e.g.*, 1 A. CASNER, *supra* note 4, at 143 n.14.

477. If the original will can be obtained from the testator's box within a week or two of the date of death, it can then be filed for probate without unduly delaying the process of estate administration. Some information, such as the name of the executor-designate, might be useful immediately upon the testator's death, but a readily available conformed copy of the will would serve this purpose. *See supra* note 473 (discussing conformed copies of wills).

478. *See supra* note 432.

479. *See supra* note 433.

480. *See supra* text accompanying notes 426–29; *supra* notes 432–33.

481. *See* T. ATKINSON, *supra* note 139, at 354, 485; A. CASNER, *supra* note 4, at 143 n.14; L. DIXON, *supra* note 432, at 38; R. LYNN, *supra* note 3, at 102.

though a number of states have enacted these statutes,[482] such custodial services are not well known and therefore are not utilized to the extent they should be.[483] When this alternative is available every estate planner should make it a practice to advise his or her clients of this service and recommend that they consider leaving the original of their wills at the county clerk's office.[484]

Wherever the original is placed, the testator should also keep at least one conformed copy in his or her home. A notation should be placed on the front of the copy specifying the exact location of the original, so that the executor-designate or some appropriate family member will know where to find the will in order to file it for probate.[485] Moreover, the practice of leaving the original will at the lawyer's office for safekeeping has at least several drawbacks in addition to the ethical concerns it raises. It is possible that the drafting lawyer may predecease the testator, retire, change law firms, or otherwise turn his or her practice over to some other attorney or attorneys.[486] If advised of this event the testator might want to reclaim the original and place it somewhere else for safekeeping.[487] Otherwise, on the testator's death the lawyer who happens to have custody of the will at that time is likely to be retained to assist the executor in administration of the estate, even though that attorney did not prepare the will or provide other legal services to the testator.[488] These problems can be avoided if the original will is kept in a safe deposit box in the testator's name, left in a box in the name of one of the testator's relatives, or filed with the local county court.

The safekeeping of a client's will can also have disadvantages from an attorney's standpoint. For example, it is possible that such safekeeping can increase an attorney's obligation to keep estate planning clients advised of changes in the law that might have an impact on their estate plans.[489] The failure to notify a client of such a change could result in a malpractice claim if the testator did not revise his or her will

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482. *See, e.g.*, KY. REV. STAT. § 394.110 (Supp. 1982); MASS. ANN. LAWS ch. 191, §§ 10–12 (Michie/Law. Co-op. 1981); MICH. COMP. LAWS § 700.142 (1980); UTAH CODE ANN. § 75–2–901 (1978).

483. *See* W. CASEY, *supra* note 427, at 596.

484. Like other safekeeping alternatives, filing the original will with the county clerk's office poses a few risks. For example, the depositing of a will for safekeeping with a clerk's office in a particular county can affect the appropriate place for administration of the estate. *See* Widdowson v. Hergenreter (*In re* Morgan's Estate), 188 Kan. 84, 360 P.2d 1077 (1961) (court holds that the county where the original will was on file had priority over another county in the same state in determining the proper jurisdiction for probate).

485. Notation of the location of the original will can serve a useful purpose in certain circumstances. For instance, the filing of an original will with the county clerk's office is not a widely utilized practice, even though authorized by statute. Thus, after the testator's death, the heirs or executor-designate could easily overlook such a location in their search for the original will. This problem could be avoided if the conformed copies contain a notation of the location of the original.

486. *See, e.g.*, Opinion No. 76–7, 61 MASS. L.Q. 119 (1976); Opinion No. 341, 46 N.Y. ST. B.J. 460 (1974); Opinion No. 334, 37 OR. ST. B. BULL. (Special Insert, Oct. 1976).

487. Opinion No. 341, 46 N.Y. ST. B.J. 460 (1974); Opinion No. 103 (Apr. 1962), WASH. ST. B. 115, *reported in* MARU & CLOUGH, *supra* note 345, at 506, No. 4621. One author has expressed concern that after the death of the draftsman-custodian, the will may fall into the hands of other lawyers notwithstanding the testator's desire to limit access to the personal matters contained in the will. C. LYMAN, *supra* note 1, at 127–28.

488. Opinion No. 76–7, 61 MASS. L.Q. 119 (1976); J. BARNES, *supra* note 1, at 8. *See generally supra* text accompanying notes 439–53 (regarding the advantages of retaining custody of the original will).

489. *See supra* notes 441–42.

to take into account any relevant amendments to the tax laws.[490] It is also possible that safekeeping might, by itself, increase the drafting attorney's malpractice exposure, since the statute of limitations on any mistake or error in a will might be tolled during the time that the document is in the custody of the draftsman.[491]

D. *Prohibition of Attorney "Safekeeping"*

When the serious ethical questions raised in the draftsman-safekeeping situation are contrasted with the fact that the benefits to clients of such custodial services can be readily achieved through any one of several alternatives, it becomes apparent that the best and most effective ethical rule is one based on an outright prohibition of such attorney practices. The other logical choice, attempting to determine whether the drafting attorney or the testator requested the safekeeping, is simply too elusive to be meaningful or effective. Further, it is unlikely that a client, without being prompted in any manner, would initiate a discussion and ask the attorney to keep the original will in his or her office.[492]

VII. USE AND ABUSE OF SELF-PROVING WILLS

Although self-proved wills were authorized by statute as long ago as 1953,[493] the real impetus for the adoption of such legislation came from the inclusion of self-proving provisions in the Uniform Probate Code, which was approved by the National Conference on Uniform State Laws and the American Bar Association in 1969.[494] At present, at least 30 states have enacted legislation sanctioning self-proved wills.[495] Such statutes permit "proof" of proper execution and attestation of a will in advance by having the testator and the witnesses appear before a notary public, either as part of the will execution ceremony or at some subsequent time, to acknowledge their signatures.[496] Upon death of the testator, a self-proved will can be admitted to probate without the necessity of having the witnesses testify as to the will's execu-

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490. *See generally* Johnston, *supra* note 441, at 655–57.

491. *See* Johnson, *supra* note 1, at 51.

492. *Cf.* State v. Gulbankian, 54 Wis. 2d 605, 612, 196 N.W.2d 733, 736–37 (1972) (Wisconsin Supreme Court expresses considerable skepticism about the number of times that a testator might actually initiate a request that the draftsman serve as executor or attorney for the estate).

493. NEV. REV. STAT. § 133.050 (1979). Although the first self-proving will statute was enacted in Nevada in 1953, similar legislation was passed in 1955 in Arkansas and Texas. *See* ARK. STAT. ANN. § 60–417 (1971) and TEX. PROB. CODE ANN. § 59 (1980). For a listing of legislation authorizing self-proved wills, see Schneider, *Self-Proved Wills—A Trap for the Wary*, 8 N. KY. L. REV. 539, 539–43 (1981).

494. *See* UNIF. PROB. CODE Historical Note & § 2–504, 8 U.L.A. 1, 111–14 (1983).

495. *See* Schneider, *supra* note 493, at 539 n.4 for a list of the jurisdictions which have enacted self-proving will statutes. Included among these jurisdictions are the 14 states that have adopted the Uniform Probate Code—Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. In addition, another ten states have statutory provisions that allow proof of a will by affidavit in certain situaitons. *Id.*

496. UNIF. PROB. CODE § 2–504, 8 U.L.A. 111 (1983). Section 2–504(a) provides for simultaneous execution, ttestation, and self-proving. Section 2–504(b) authorizes the self-proving of a will by affidavit of the testator and itnesses after the will's execution and attestation. *See infra* text accompanying notes 499–507.

tion, thus simplifying the initiation of the estate administration process.[497] This can prove particularly useful if the witnesses are deceased, if they are out of the jurisdiction, or if they can not otherwise be located upon the testator's death.[498]

As originally proposed, self-proving required two separate steps. The first was execution and attestation of a will, following the same procedure that would have been utilized had there been no self-proving provisions; the second required the appearance of the testator and witnesses before a notary public for execution of a self-proving affidavit to be appended at the end of the will.[499] Even if a notary was present at the will execution ceremonies, the legislation still anticipated a two-step procedure.[500] In a number of cases the statutory procedures were not precisely fol-

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497. Although the legal effect of a self-proving affidavit can vary substantially from jurisdiction to jurisdiction, even those states that have limited such legislation agree that the provisions dispense with the necessity of witnesses' testimony at the initiation of probate. *See, e.g.*, OKLA. STAT. ANN. tit. 84, § 55 (West Supp. 1982–1983) (providing that "A self-proved testamentary instrument shall be admitted to probate without the testimony of any subscribing witness, unless contested, but otherwise it shall be treated no differently than a will not self-proved."). The effect of self-proving may be considerably greater, however, in other jurisdictions. *See, e.g.*, UNIF. PROB. CODE § 3–406(b), 8 U.L.A. 278–79 (1983) (providing that the signature requirements for execution are "conclusively presumed" if a will is self-proved). *See generally* J. RITCHIE, N. ALFORD, JR. & R. EFFLAND, DECEDENTS' ESTATES AND TRUSTS 206–07 n.34 (6th ed. 1982).

498. *See* J. RITCHIE, N. ALFORD, JR. & R. EFFLAND, *supra* note 497, at 206–07 n.34.

499. UNIF. PROB. CODE § 2–504, 8 U.L.A. 349–50 (1969), as originally adopted, provided:

> An attested will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:
>
> THE STATE OF _____
>
> COUNTY OF _____
>
> We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.
>
> _____
> Testator
>
> _____
> Witness
>
> _____
> Witness
>
> Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____, _____.
> (SEAL)
>
> (Signed)_____
>
> _____
> (Official capacity of officer)

Id. This two-step self-proving procedure now appears in UNIF. PROB. CODE § 2–504(b), 8 U.L.A. 112–13 (1983).

500. Thus, in many instances, the testator, the witnesses, and a notary public would be gathered in one room by the attorney-draftsman. The testator would then sign the will in the presence of the witnesses. The witnesses, in the presence of the testator and each other, would sign as witnesses. Finally, the testator and witnesses would sign the self-proving affidavit before the notary, and the latter would, in turn, complete the affidavit by signature and official seal. *See generally* 1 A. CASNER, *supra* note 4, at 132–46; J. PRICE, CONTEMPORARY ESTATE PLANNING TEXT AND PROBLEMS 209–12 (1983). The two-step self-proving process might be expedited by having the testator sign both the will and the

lowed, and wills were executed, attested, and notarized in a manner that cast a shadow on their validity. In some instances only the testator executed the will, but the testator and the witnesses all signed the self-proving affidavit before a notary.[501] In other situations, neither the testator nor the witnesses subscribed the will itself, but they all executed the self-proving affidavit.[502] A number of the courts that have considered the issue of the validity of the underlying will in such circumstances have strictly applied the statutory requirements for execution and attestation, and have concluded that the wills in question were invalid.[503] Courts in other jurisdictions have been more lenient in their interpretation, and have upheld the validity of the wills as a matter of substance over form.[504]

As a result of such litigation, it became clear that the self-proving provisions should be amended to authorize a one-step as well as the original two-step procedure. Thus, in 1975, Section 2-504 of the Uniform Probate Code was modified to include a self-proving form integrating execution, attestation, and the self-proving affidavit so that only one signature was required by each of the participants.[505] In addition, the

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affidavit, and then having the witnesses, before a notary public, sign the will and the affidavit. Supervising attorneys, however, should proceed with extreme caution before adopting variations to expedite and consolidate the execution, attestation, and self-proving procedures, since courts have on a number of occasions held wills invalid because of an attempted abbreviation of the self-proving will process. *See infra* text accompanying notes 501–03.

501. *See, e.g., In re* Estate of Charry, 359 So. 2d 544 (Fla. Dist. Ct. App. 1978); Petty v. White (*In re* Estate of Petty), 227 Kan. 697, 608 P.2d 987 (1980); *In re* Estate of Sample, 175 Mont. 93, 572 P.2d 1232 (1977); *In re* Estate of Cutsinger, 445 P.2d 778 (Okla. 1968); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966).

502. *See, e.g.*, McGrew v. Bartlett, 387 S.W.2d 702 (Tex. Civ. App. 1965).

503. *See In re* Estate of Sample, 175 Mont. 93, 572 P.2d 1232 (1977); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966); McGrew v. Bartlett, 387 S.W.2d 702 (Tex. Civ. App. 1965). An Arizona court of appeals took this hard-line approach a step further in Busse v. Mackaben (*In re* Estate of Mackaben), 126 Ariz. 599, 617 P.2d 756 (Ct. App. 1980). In *Mackaben* the testator and the witnesses signed both the will and the self-proving affidavit, but the will did not contain an attestation clause. The self-proved statutory form was followed to the letter. Nevertheless, because of the failure to include an attestation clause, the court looked to the self-proving provisions for proof that the will had been signed and witnessed in the required statutory manner since the witnesses themselves had an inadequate recollection of those events. The court concluded that the affidavit did not supply the necessary proof and found the will invalid.

Mackaben thus represents an extreme example of a court giving little credence to the self-proving provisions by insisting on independent proof of due execution and attestation. By way of contrast, UNIF. PROB. CODE § 3–406(b), 8 U.L.A. 278–79 (1983) provides that "[i]f the will is self-proved, compliance with signature requirements for execution is conclusively presumed . . . . "

504. *See, e.g., In re* Estate of Charry, 359 So. 2d 544 (Fla. Dist. Ct. App. 1978); Petty v. White (*In re* Estate of Petty), 227 Kan. 697, 608 P.2d 987 (1980); *In re* Estate of Cutsinger, 445 P.2d 778 (Okla. 1968).

505. UNIF. PROB. CODE § 2–504 comment, 8 U.L.A. 113 (1983). The one-step self-proving affidavit, which was added as § 2–504(a), provides:

> Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:
>
> I, _____, the testator, sign my name to this instrument this _____ day of _____, 19___, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.
>
> _____
> Testator
>
> We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and

original two-step procedure was retained whereby the will could be subscribed by the testator and witnesses, followed by a separate acknowledgement before a notary.[506] In an effort to avoid the unfortunate litigation that had arisen in some jurisdictions as a consequence of the failure to observe precisely the two-step process, several of these states have now amended their laws to provide for the alternative one-step approach for self-proved wills.[507]

A. *Failure to Utilize Self-Proving Provisions*

Since self-proving provisions can substantially expedite the process for admission of a will to probate,[508] the procedures should always be utilized whenever they are authorized in the jurisdiction where the testator is domiciled. Because so many states now recognize self-proved wills, it would also seem prudent for estate planners in jurisdictions that do not have such a statute to use the procedures anyway since the state where the will in question is to be executed might change its laws and authorize self-proved wills, or the testator might later become domiciled in another state that has enacted such a statute.[509] But even if the jurisdiction where the testator is domi-

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hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

The State of _____

County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this _____ day of _____.
(Seal)

(Signed)_____

_____
(Official capacity of officer)

UNIF. PROB. CODE § 2-504(a), 8 U.L.A. 111-12 (1983).

506. UNIF. PROB. CODE § 2-504(b), 8 U.L.A. 112-13 (1983) (quoted in full *supra* note 499).

507. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2504 (West Supp. 1982-1983); COLO. REV. STAT. § 15-11-504 (Supp. 1982); KY. REV. STAT. § 394.225 (Supp. 1982); UTAH CODE ANN. § 75-2-504 (1978). The decisions that have invalidated wills when the two-step self-proving provisions were not precisely followed appear to have resulted from inadvertency or the draftsman's attempt to shortcut the specified procedure. *See supra* note 503. Unfortunately, the statutes themselves may have given draftsmen more confidence about modifying the self-proving language than was warranted, because they provide that the self-proving provisions could be effectuated by use of an affidavit "in substantially" the form set out in full in the statute. *See* UNIF. PROB. CODE § 2-504, 8 U.L.A. 111 (1983). Whether the problems were caused by inadvertence or attempted abbreviation, they are less likely to occur when the one-step process is utilized.

508. *See supra* text accompanying notes 496-98.

509. Self-proving statutes appear by their terms to be retroactive. *See, e.g.*, UNIF. PROB. CODE § 2-504, 8 U.L.A. 111 (1983); KY. REV. STAT. § 394.225 (Supp. 1982); UTAH CODE ANN. § 75-2-504 (1978). Thus, if an affidavit is employed by a draftsman at a time when the testator's domicile does not have a self-proving will statute, but such legislation is enacted in the jurisdiction prior to the testator's death, the self-proving statute would be applicable to the testator's will.

ciled at the time of death does not authorize self-proving wills, nothing would appear to be lost by an estate planner's use of these procedures because they should not adversely affect a will's basic validity.[510]

In spite of the benefits of self-proving provisions, lawyers who prepare wills and codicils, even in jurisdictions in which self-proved wills are authorized, apparently do not utilize these procedures to the extent they should.[511] A number of reasons undoubtedly explain the failure to make maximum use of these self-proving provisions. It is possible, for instance, that some lawyers, particularly those who have been practicing for a number of years, are not familiar with the legislation or are not fully aware of the advantages of using self-proved wills, and, accordingly, continue with the same execution procedures they have employed throughout the years they have been in practice.[512] But lawyers are expected to keep up with changes in the law, at least in those areas in which they practice, and ignorance of or a lack of familiarity with such legislation is not an acceptable excuse for not using these procedures.[513] Also, a notary public may not be readily available to a lawyer who is a sole practitioner or is with a small firm, and hence the self-proving provisions may be omitted for convenience.[514] This is also not a valid basis for failing to use self-proved

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510. The law of the testator's domicile at date of death is generally applicable to will execution and attestation requirements as to realty whose situs is in that jurisdiction and as to personalty wherever it is located. *See generally* T. ATKINSON, *supra* note 139, at 487–89. Some estate planners are concerned about employing the new one-step self-proving procedure even though its use is sanctioned in the relevant jurisdiction because the testator may change his or her residence and die while domiciled in a state that does not have a statute sanctioning self-proving wills or that has self-proving legislation but limits it to the two-step process. This concern arises because a one-step self-proved will meeting the requirements of U.P.C. § 2-504(a), 8 U.L.A. 111–12 (1983) might be found fatally defective in some other jurisdiction that does not have comparable legislation. In view of some of the hardline decisions in the area of self-proving wills, these concerns cannot be dismissed as frivolous. *See In re* Estate of Sample, 175 Mont. 93, 572 P.2d 1232 (1977); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966); McGrew v. Bartlett, 387 S.W.2d 702 (Tex. Civ. App. 1965). These estate planners have resolved this problem not by avoiding self-proving provisions altogether, but by use of the two-step process reflected in U.P.C. § 2-504(b), 8 U.L.A. 349–50 (1969). If properly utilized, this procedure should not raise questions even in jurisdictions that do not recognize any form of self-proving will since the affidavit is added at the end of the will after the testator's signature, the attestation clause, and the witnesses signatures. Thus, at worst, the affidavit should be treated as mere surplusage having no effect on the basic validity of the will.

511. For example, in 1974 the Kentucky legislature enacted the two-step self-proved will, which became effective in that jurisdiction on June 21, 1974. KY. REV. STAT. § 394.225 (Supp. 1982). In 1982 Kentucky added the one-step procedure to its self-proved will statute. KY. REV. STAT. § 394.225 (Supp. 1982). Yet, it appears that self-proving provisions are not being utilized in Kentucky to the extent that one would expect. Johnston Survey, *supra* note 180. Wills that were holographic or that were prepared by out-of-state lawyers for testators who lived in other jurisdictions at the time of will execution were excluded from the survey. In Bourbon County, Kentucky, that left a total of 60 wills filed for probate during the one year period, and 21 of those wills were executed prior to the June 21, 1974 effective date for self-proving wills and the remaining 39 were executed after June 21, 1974. Out of 39 wills, only 4, or 10% included self-proving provisions. In Fayette County, Kentucky, out of 219 wills filed during the four-month period, 79 were excluded because they were holographic or were drafted in another state. Of the remaining 140, 34 had been executed prior to the effective date for self-proving provisions and 106 wills were executed after June 21, 1974. 57 of 106 wills (54%) contained self-proving affidavits and the remaining 49 (46%) did not.

512. It is also possible that lawyers in a rural county like Bourbon County, Kentucky feel that it is easy to locate witnesses and have them testify as to execution and attestation of a testator's will, and thus tend to overlook the self-proving provisions.

513. An attorney's lack of knowledge as to applicable law is often the foundation for a successful legal malpractice suit. *See, e.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979); Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976); McAbee v. Edwards, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976); Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958).

514. This may provide a partial explanation for the low percentage of self-proved wills in Bourbon County, Kentucky. *See supra* note 511. However, many lawyers who practice in Kentucky are notary publics and their failure to utilize self-proving provisions is difficult to understand.

wills in view of the benefits that may be achieved by utilizing such provisions. Furthermore, it does not appear that it would be difficult to make arrangements for execution at a nearby bank, where a notary could readily participate in the procedure.

It is conceivable, of course, that an attorney's failure to use self-proving terms in a particular will may have been due to the exigencies of the situation, rather than ignorance or inadvertence. For example, because of a client's health, it may be necessary for the will to be executed at the testator's residence, nursing home, or hospital room, where it might be impractical to have a notary in attendance.[515] Even though a lawyer who drafts a will under such circumstances should advise the testator about the procedures for having the will self-proved at a later time, it is entirely possible that the testator did not or could not follow that advice. Nevertheless, the situations in which it would be impractical to include self-proving as part of the execution ceremonies would seem to account for only a limited number of the instances in which wills are not self-proved.[516] Finally, some lawyers apparently justify their failure to use self-proving wills on the grounds of their concern about the will contest litigation that has arisen in a number of jurisdictions as a consequence of the misuse of the procedures.[517] This rationale also falls short of the mark. In virtually all of the cases in which the validity of a will has been thrown into question by a mistake in executing self-proved provisions, the errors would have been averted had a competent attorney familiar with the self-proving legislation properly supervised the execution, attestation, and acknowledgement.[518] Thus, any lawyer who is sufficiently cautious to be concerned about the consequences of misuse of the self-proving provisions is likely to be careful enough to make certain that the straightforward procedures are complied with in the precise manner indicated in the statute.[519]

B. *Possible Unethical Motives*

There may also be a more self-serving reason why, at least in some instances, an attorney would draft wills that are not self-proving. If a lawyer prepares wills that do

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515. If the attorney is a notary public or if he or she is otherwise going to be accompanied by a secretary or paralegal who is a notary, the will should, of course, contain self-proving provisions. If it is not possible to have a will made self-proving at the time of execution, then the attorney who drew the will and supervised its execution should immediately write a letter to the testator urging the client and witnesses to appear before a notary in order to add the self-proving affidavit.

516. Many reasons explain why testators are prompted to make wills, and concern about death because of old age or serious illness is only one of these. *See generally* Sussman, Cates & Smith, *supra* note 185, at 26–30. If possible, the testator should come to the attorney's office so that the draftsman can preside over the will execution ceremonies. The chances of a mistake in executing or witnessing a will are greatly increased if no attorney is present, and it is possible that a lawyer could be held liable for any errors committed in his or her absence that would not have occurred had the attorney personally supervised execution and attestation. *See* Johnston, *supra* note 441, at 650–52.

517. *See supra* note 510.

518. *See supra* notes 503 & 507.

519. *But see* Busse v. Mackaben (*In re* Estate of Mackaben), 126 Ariz. 599, 617 P.2d 765 (Ct. App. 1980), in which the self-proving provisions were followed to the letter, but the will did not contain an attestation clause. The court gave the affidavit little credence and invalidated the will when the witnesses were unable to recall the manner of execution and attestation. *Id.* at 601, 617 P.2d at 767. Unfortunately, the self-proving affidavit set out in the statute was held not to be a substitute for an attestation clause, because the affidavit did not provide that the testator signed or acknowledged his signature in the witnesses' presence, or that the witnesses signed in each others' presence. In addition to the criticism that should be leveled at the Arizona Court of Appeals for its overly technical decision in *Mackaben*, it is advisable that a self-proving affidavit in Arizona and elsewhere set forth the precise execution and attestation requirements of the particular jurisdiction so that the affidavit could, if necessary, serve as an attestation clause. *See* Effland, *Self Proved Wills*, 16 ARIZ. B.J. 31 (Feb. 1981) (in-depth review and criticism of *Mackaben*).

not contain such provisions, and uses others in the office to serve as witnesses, then upon the testator's death it would be necessary for the executor to contact the witnesses in the drafting attorney's office in order to obtain their testimony as a part of the process of having the will admitted to probate.[520] In such circumstances, it would be difficult for the executor not to retain the services of the drafting attorney to assist in probate.[521] Thus, the failure to incorporate self-proving provisions may be yet another practice utilized by some estate planning lawyers to help ensure their retention after the testator's death.[522]

To the extent that such omissions are intentional, this conduct raises serious ethical questions similar in nature to the solicitation and conflicts of interest issues presented by the safekeeping of clients' wills.[523] Certainly the solicitation of future business, or at least conduct calculated to enhance the possibility of future employment, is so subtle in these circumstances that a testator is hardly likely to know about or be able to guard against this practice.[524] Even if the self-proving provisions are not intentionally omitted, but are not used because the drafting attorney did not know of or fully understand the benefits of such procedure, this would also raise an ethical issue because the Code of Professional Responsibility specifically warns lawyers not to undertake matters when they are not able to handle them competently.[525] A

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520. Unless a will is self-proved or informal probate proceedings are sanctioned (*see* UNIF. PROB. CODE §§ 3-301 to 3-311, 8 U.L.A. 245–56 (1983)) the witnesses will have to testify as to the circumstances of execution for a will to be admitted to probate. *See supra* text accompanying notes 496–98.

521. This is, of course, analogous to the situation in which the attorney-draftsman has served as custodian for a will that he or she drafted, where it is difficult after the testator's death for the executor-designate or other close family member to ask the custodian for the original will without employing that attorney to provide legal services to the estate. *See supra* text accompanying notes 449–53.

522. This author first became aware of the possibility of such a practice during a presentation on ethics given at a C.L.E. seminar on estate planning held in Lexington, Kentucky on July 23, 1982. During the question and answer session that followed the talk, a lawyer asked about the ethical implications of the conduct of some lawyers he knew who intentionally omitted use of self-proved wills as a means of enhancing their employment after the testator's death. Later, during one of the breaks, several other lawyers approached this author and indicated that they, too, believed that this practice was being utilized by certain attorneys for purposes of securing their retention to assist with probate administration. Further confirmation came that Fall during a seminar on Estate Planning at the University of Kentucky College of Law. In the course of a class devoted to ethics in estate planning, several students who were then employed as clerks for law firms indicated that attorneys in those firms made it a practice to omit the self-proving provisions so that it would be necessary, in order to commence probate proceedings after the testator's death, to obtain the testimony of those in the office who had served as witnesses.

523. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), 5-101(A) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8(a), 7.3 (1983). For a discussion of the solicitation and conflicts of interest problems raised in the context of attorney safekeeping of wills, see *supra* text accompanying notes 454–69.

Apparently, only one ethics opinion has considered the propriety of omitting self-proving will provisions. *See* Opinion No. 360, 35 TEX. B.J. 408 (1972). Although Opinion No. 360 deals principally with attorneys' use of themselves, their relatives, or their employees as witnesses to wills they draft, the submitted question was framed in terms of use of such witnesses when a self-proving affidavit was omitted. The opinion concluded that it was not unethical to utilize such witnesses, and, in passing, noted that "[a]n attorney preparing a will may be subject to criticism, but not discipline for not having used a self-proving affidavit on the will." *Id.* There appear to be no reported judicial decisions that have addressed this issue.

524. This is closely analogous to the issue of improper solicitation that is raised in the will safekeeping context. *See supra* text accompanying notes 454–56.

525. DR 6-101(A) provides:

A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A) (1983). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3, 6-4 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

lawyer's competency should be questioned if he or she is inadvertently drafting wills that are not self-proving in a jurisdiction where these procedures are authorized.

Since there has been little or no warning to the members of the bar about the ethical problems that may be inherent in the failure to use self-proved wills, it seems inappropriate at this time to attempt to discipline lawyers for not including these provisions in the wills they are preparing.[526] At this juncture, therefore, efforts should be made to raise the consciousness of the bar about these ethical concerns. This can be readily accomplished with an opinion issued by a state's ethics committee. Once this position has been publicized, a draftsman's failure to utilize self-proving provisions should subject that attorney to ethical sanctions.[527] Such conduct, however, is unlikely to come to the attention of the appropriate disciplinary authorities through normal channels such as client complaints or prior judicial proceedings highlighting questionable attorney conduct.[528] For this reason, probate officials could provide a valuable service by bringing situations involving the failure to utilize self-proving provisions to the attention of the bar's disciplinary office.[529]

VIII. CONCLUSION

Many common estate planning practices raise serious ethical questions. Yet, with one or two notable exceptions, very little has been done to proscribe such conduct. Even the recently adopted ABA Model Rules of Professional Conduct fail to establish useful guidelines for attorneys practicing in the area. In fact, it was not until the last ten years that the courts began to impose stringent disciplinary sanctions on attorneys who drafted wills for their clients in which they were named as substantial beneficiaries. Other reprehensible conduct that is not so blatant, like the practice

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526. A thorough search uncovered only one ethics opinion even mentioning the ethical implications of intentionally failing to include self-proving provisions in wills. *See supra* note 523. In similar circumstances, when a new or different interpretation governing attorney conduct has been adopted, courts have been inclined to use the proceedings to notify members of the bar of their position rather than merely for the imposition of discipline of the particular attorney who is before the court. *See, e.g.*, State v. Gulbankian, 54 Wis. 2d 605, 612–13, 196 N.W.2d 733, 737 (1972); State v. Collentine, 39 Wis. 2d 325, 332, 159 N.W.2d 50, 53 (1968); State v. Horan, 21 Wis. 2d 66, 75, 123 N.W.2d 488, 492 (1963).

527. Such conduct, unless reflecting a continuous pattern, may not be serious enough to warrant suspension or disbarment. A more moderate form of discipline intended for minor misconduct, like a reprimand or admonition, would be more appropriate. *See* ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 6.9–6.10 commentaries (Feb. 1979). On the other hand, the consistent and intentional omission of self-proving provisions in numerous wills by an attorney could warrant more serious disciplinary action. *Cf.* State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

528. In this respect, an attorney-draftsman's intentional omission of self-proving affidavits is very different from the preparation of a will in which the draftsman is included as a beneficiary. In this latter context, a disgruntled beneficiary whose share has been reduced or deleted by reason of inclusion of a bequest to the attorney-draftsman may complain to bar authorities about the conduct or institute suit to contest the will on grounds of undue influence. *See supra* text accompanying notes 26–30.

529. A comparison to the draftsman-beneficiary situation is again useful. When a lawyer prepares a will in which he or she is included as a beneficiary, there is a substantial possibility that this conduct may be brought to the attention of a bar association ethics committee through the complaints of persons who have been adversely affected by such conduct. *See supra* text accompanying notes 28–29. The consequences of failing to include self-proving provisions in a will clearly do not have a direct financial impact on beneficiaries named in the will. Under the circumstances, the conduct is unlikely to be brought to the attention of the appropriate bar authorities unless judges and others who are responsible for probate administration are aware of these shortcomings and fill the void. *See supra* text accompanying notes 365–67 (pertaining to the need for similar efforts by probate authorities to bring questions regarding the propriety of a draftsman's designation of himself or herself as attorney for the estate to the attention of disciplinary authorities).

among some lawyers of drafting wills designating themselves as attorneys to probate the estate, has gone largely unnoticed and undisciplined.

Most, if not all, of these questionable practices are an outgrowth of efforts by drafting attorneys to enhance the chances of their retention after their clients' deaths. A great deal of discussion has occurred in recent years about making estate planning more profitable at the outset. If this were to become a widespread reality, it might relieve some of the pressure from securing employment during probate as a means of justifying the "loss leader" approach to fees for will drafting. Moreover, if probate reform were to progress to the point at which estate work were no more profitable than other legal employment requiring comparable skill and effort, this could also reduce reliance on questionable practices geared to enhancing retention in subsequent probate administration. Such changes on any significant scale, however, are likely to be years away. Further, there is no assurance that higher fees at the outset for estate planning services or a more reasonable basis for attorney charges in estate administration would result in a significant reduction in the employment of dubious practices to secure post-death employment. If anything, the influx of new lawyers into the profession is likely to increase, rather than diminish, the pressures for obtaining legal work, including probate administration, and thereby serving to exacerbate the present ethical problems.

Thus, time alone appears unlikely to bring about the sort of changes or reforms that might eliminate or significantly reduce the questionable procedures that currently exist in estate planning. As a consequence, the courts and bar authorities need to assume responsibility in this area, and deal directly and decisively with these issues. The first step is to increase attorney awareness of the ethical problems that many of the common estate planning practices clearly raise. Once alerted to these issues, a number of lawyers who draft wills and trusts may prefer to avoid a course of conduct that could be considered unethical. Also, it should be recognized that most estate planning consumers are not sophisticated in the area or familiar with attorneys' motives and methods. Accordingly, the disciplinary authorities should develop clear-cut, stringent standards that preclude solicitation and overreaching in an atmosphere where clients are not generally aware of what is transpiring and are thus largely incapable of protecting their own interests.